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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 81

C. W. GARRETT, ADMINISTRATOR OF T. W. LEWIS, JR., DECEASED, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED DECEMBER 23, 1912.

(23,471)

(23,471)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 404.

C. W. GARRETT, ADMINISTRATOR OF T. W. LEWIS, JR., DECEASED, PLAINTIFF IN ERROR,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1914.

1–4 United States Circuit Court of Appeals, Sixth Circuit.

No. —.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Plaintiff in Error,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

Record.

5&6 UNITED STATES OF AMERICA,
Middle Dist. of Tennessee:

3633½. Law.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Record.

Attorneys:

H. N. Leech, Clarksville, Tenn., for plaintiff.
John B. Keeble, Nashville, Tenn.; M. Savage, Clarksville, Tenn., for defendant.

7 TRANSCRIPT OF RECORD.

At a regular term of the United States Circuit Court for the Middle District of Tennessee, begun and holden at the custom house in Nashville, Tenn., upon the second Monday of April, 1909, and subsequent terms, present and presiding the Honorable Edward T. Sanford, the following proceedings were had, to-wit:

On April 4, 1910, the following transcript from Circuit Court of Houston County, Tenn., was filed:

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Caption.

STATE OF TENNESSEE,
Houston County:

Be It Remembered—That at a Circuit Court of the Ninth Judicial Circuit, begun and held in and for said County of Houston, at the

courthouse in the town of Erin, on the fourth Monday in March, in the year of our Lord nineteen hundred and ten, and of the American independence the one hundred and thirty-fourth year, present and presiding the Honorable W. L. Cook, Judge of said circuit, when the following proceedings were had:

The court was opened in due form by C. D. French, sheriff of said county, and by him was returned into court a writ of venire facias, delivered to him by the clerk of the County Court of said county, showing that at the January term thereof, 1910, said court had appointed the following persons, being good and lawful men of said county, to serve as jurors at the present term of this court, towit, etc.:

Declaration.

In the Circuit Court of Houston County, March Term, 1910.

C. W. GARRETT, Admr. of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The plaintiff, C. W. Garrett, as administrator of T. W. Lewis, Jr., sues the defendant, the Louisville & Nashville Railroad Com-
8 pany in the sum of fifty thousand dollars ($50,000.00) and for cause of action says:

First Count.

The plaintiff is a citizen of the State of Kentucky, and is the administrator of T. W. Lewis, Jr., by appointment of the County Court of Stewart County, Tenn.

That said defendant was at the time of his death twenty-four years of age, a strong and vigorous young man of fine business qualifications and earning capacity, and left surviving him T. W. Lewis, his father, and Mrs. T. W. Lewis, his mother, and who still survive him;

That on and prior to September 27, 1909, said defendant railroad company was, under a charter granted by the State of Kentucky, a common carrier by railroad engaged in commerce between the States of Kentucky and Tennessee and other states, and that on said date was running two of its freight trains in the carrying on of commerce between Kentucky and Tennessee, between Bowling Green, in Kentucky, and Paris, in Tennessee, and on the said freight train running from Bowling Green to Paris on the date named plaintiff's intestate was employed as a brakeman, being the front brakeman;

That the train dispatcher's office, controlling the movements of defendant's trains on its line of road between said two points, in said states, was located at Paris, in Tennessee; that on the date named the dispatcher at Paris wired to the telegraph operator or office at Stewart, Tenn., a station on said line of railroad between the said two points, an order for the said train going south, and on which said decedent was a brakeman at the time, that the train going north from Paris

to Bowling Green at that time would wait for the train going south until a given time, 12:40 a. m., or thereabouts, the said train going north having the right of way on the main line as against said train going south, at Big Sandy, a station south of Stewart, on said line of railroad, and gave the same order at Paris to the engineer and conductor of the train going north; that this order was received, as sent, at Stewart, by the operator at that point and delivered to the engineer and the conductor of said train going south.

That after said order was received, as stated, the dispatcher changed the meeting and passing place of the said two trains from Big Sandy to Faxon, a station about five miles north of Big Sandy, and
9 wired an order to this effect to the operator at Paris and to the one at Stewart, a station north of Faxon on said line, stating that the train going north would wait at Faxon until a given time—naming the exact time—for the train going south;

That this order was received by the telegraph operator at Paris, and correctly delivered to and received by the conductor and engineer of the train going north, but through negligence the telegraph operator at Stewart did not deliver this order changing the place of meeting and passing of the trains to either the conductor or engineer of the train going south, as it had been sent to and given to him by the train dispatcher at Paris, but did deliver it in such form and condition that it did not inform the engineer and conductor on said train going south that the former order had been revoked, and the meeting and the passing place changed from Big Sandy to Faxon;

That because of this negligence on the part of the said operator at Stewart, the engineer and conductor in charge of the train going south did not stop at Faxon, as it should have done under the order as sent by the train dispatcher to the operator at Stewart, for the north-bound train to pass it, but ran on until a collision of the said two trains occurred on the main line of defendant's railroad about one and a half miles north of Big Sandy;

That in this collision, in an effort to save his life by jumping from the window of the engine when it was seen that the collision was imminent, and without fault upon his part, plaintiff's intestate was caught under the engine as it fell over, the lower part of his body remaining under the engine some six hours or more, during which time he remained conscious and suffered intense agony and pain from the weight of the engine and from hot water poured on him from the boiler, and died before the engine could be removed from off his body.

Wherefore, because of the said negligence, which was wilful and reckless, of the said defendant's officers, agents and employees causing said injuries and death, plaintiff, as administrator of the said intestate, sues the defendant, for the benefit of his parents, in the sum of fifty thousand dollars damages, and asks for a jury to try the case.

Second Count.

The plaintiff, C. W. Garrett, as administrator of T. W. Lewis, Jr., sues the defendant, the Louisville & Nashville Railroad Company in

the sum of fifty thousand dollars, and for cause of action says:

10 That plaintiff is a citizen of the State of Kentucky, and is the administrator of T. W. Lewis, Jr., by appointment of the County Court of Stewart County, Tenn.;

That said decedent was at the time of his death twenty-four years of age, a strong and vigorous young man, of fine business qualifications and earning capacity, and left surviving him T. W. Lewis, his father, and Mrs. T. W. Lewis, his mother, and who still survive him;

That on and prior to September 27, 1909, said defendant of Kentucky, — a common carrier by railroad engaged in commerce between the States of Kentucky and Tennessee and other states, and that on said date — was running two of its freight trains in the carrying on of commerce between Kentucky and Tennessee between Bowling Green, in Kentucky, and Paris, in Tennessee, and on the said freight train running from Bowling Green to Paris on the date named plaintiff's intestate was employed as a brakeman, being the front brakeman;

That the train dispatcher's office, controlling the movements of defendant's trains on its line of road between said two points in said states, was located at Paris, in Tennessee; that on the date named the dispatcher at Paris wired to the telegraph operator or office at Stewart, Tenn., a station on said line of railroad between the said two points, an order for said train going south, and on which said decedent was a brakeman at the time, that the train going north from Paris to Bowling Green at that time would wait for the train going south until a given time, 12:40 a. m., or thereabouts, the said train going north having the right of way on the main line as against said train going south, at Big Sandy, a station south of Stewart, on said line of railroad, and gave the same order at Paris to the engineer and conductor of the train going north; that this order was received as sent at Stewart by the operator at that point, and delivered to the engineer and conductor of said train going south;

That after said order was received as stated the dispatcher changed the meeting and passing place of the said two trains from Big Sandy to Faxon, a station about five miles north of Big Sandy, and wired an order to this effect to the operator at Paris and to the one at Stewart, a station north of Faxon on said line, stating that the train going north would wait at Faxon until a given time—naming the exact time—for the train going south;

That this order was received by the operator at Paris, and correctly delivered to and received by the conductor and engi-

11 neer of the train going north, but, through negligence, the telegraph operator at Stewart did not deliver this order changing the place of meeting and passing of the trains to either the conductor or engineer of the train going south, as it had been sent to and given to him by the train dispatcher at Paris, but did deliver it in such form and condition that it did not inform the engineer and conductor on said train going south that the former order had been revoked and the meeting and passing place changed from Big Sandy to Faxon;

That the said engineer and conductor in charge of said train going

south were themselves guilty of negligence, after having received the order in the form delivered to them by said operator at Stewart, in running the train past the station Faxon;

That by reason of said negligence of said telegraph operator at Stewart, and of the said engineer and conductor in charge of the said north-bound train in running it past Faxon without waiting for the north-bound train, a collision of the two trains occurred at a point about a mile and a half north of Big Sandy;

That in this collision in an effort to save his life by jumping from the window of the engine when it was seen that the collision was imminent, and without fault upon his part, plaintiff's said intestate was caught under the engine as it fell over, the lower part of his body remaining under the engine some six hours or more, during which time he remained conscious and suffered intense pain from the weight of the engine and from hot water poured on him from the boiler, and died before the engine could be removed from off his body.

Whereupon, because of the said negligence, which was gross, wilful and reckless, of the said defendant's officers, agents and employees, causing said injuries and death, plaintiff, as administrator of the said intestate, sues the defendant for the benefit of his said parents in the sum of fifty thousand dollars damages, and asks for a jury to try his case.

Third Count.

The plaintiff, C. W. Garrett, as administrator of T. W. Lewis, Jr., further sues the defendant, the Louisville & Nashville Railroad Company, in the sum of fifty thousand dollars, and for cause of action says:

That he is a citizen of the State of Kentucky and is the administrator of T. W. Lewis, Jr., under letters of administration granted him by the County Court of Stewart County, Tenn.;

12 That the defendant, the Louisville & Nashville Railroad Company, is a corporation, under the laws of the State of Kentucky, operating a line of railway through the States of Kentucky and Tennessee;

That on the 27th day of September, 1909, plaintiff's intestate was killed in a collision between two of the freight trains of defendant at a point about a mile and a half of Big Sandy, a station on its line of railroad in the State of Tennessee, under these circumstances:

Said decedent was a front brakeman on a freight train on defendant's line, running south from Bowling Green, Ky., to Paris, Tenn.;

That at Stewart, in Houston County, Tenn., a station on said line of railroad, the engineer and conductor in charge of said freight train received an order from the telegraph operator in the employ of the defendant company at that point, that the north-bound train from Paris, Tenn., to Bowling Green, Ky., would wait at Big Sandy for said south-bound train until a given time, named—12:40 a. m., or thereabouts—and the same order was delivered to the said north-bound train at Paris;

That before the south-bound train left Stewart said order was re-

voked and the train dispatcher at Paris wired an order to the Paris operator for the train going north and to the telegraph operator at Stewart for the train going south revoking said order, and changing the meeting and passing point for said trains from Big Sandy to Faxon, a station about five miles north of Big Sandy, stating that the train going north would wait for the train going south at Faxon instead of Big Sandy until a given time, named;

That this second order was received by the operator at Paris as sent by the train dispatcher, and delivered to the engineer and conductor on the train going north as sent and received, and was received as sent by the telegraph operator at Stewart for the said south-bound train, but was not delivered by said operator to the engineer and conductor of said south-bound train as sent and received; that the said operator at Stewart, through negligence, delivered the order in a form and condition different from that in which it was received by him to the engineer and conductor on said south-bound train, and in such condition as not to inform said engineer and conductor of the change in the meeting and passing point from Big Sandy to Faxon;

That by reason of said negligence of the said operator, and also by reason of the negligence of said engineer and conductor after receiving this second order in the form and condition in which it was delivered to them by the said operator, the said south-
13 bound freight train did not wait at Faxon for said north-bound train to pass it, but went by that station and ran into the north-bound train on the main line about one and a half miles north of Big Sandy, the said north-bound train having passed Big Sandy because of the receipt of the said order revoking the first order making that the meeting and passing point for said two trains;

That in this collision, when imminent, in an effort to save his life and without any fault on his part, plaintiff's intestate jumped from the window of the engine and was caught under the engine as it fell over; that the lower portion of his body, while he was still conscious remained under the engine some six hours, during which time he suffered intense agony and pain from the weight of the engine and from hot water poured on him from the boiler and died before the engine could be removed from off his body;

That the said operator at Stewart and the said engineer and conductor on said south-bound train were guilty of gross, wilful and reckless negligence, as stated, and which resulted in the death of plaintiff's intestate.

Plaintiff's intestate left surviving him his father, T. W. Lewis, and his mother, Mrs. T. W. Lewis, and brothers and sisters, and was a young man twenty-four years of age, of strong and vigorous constitution, of good business qualifications and earning capacity.

Wherefore, plaintiff, as administrator of the said decedent, sues the defendant in the sum of fifty thousand dollars damages, and asks for a jury to try the case.

(Signed) H. N. LEECH,
Attorney for Plaintiff.

Declaration filed March 31, 1910.
(Signed) SIDNEY BOONE, *Clerk.*

In the Circuit Court of Houston County, State of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Deceased, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

To the Honorable W. L. Cook, of the Ninth Judicial Circuit of Tennessee, holding Circuit Court of Houston County, Tenn.:

Your petitioner, the Louisville & Nashville Railroad Company, respectfully shows that it was duly incorporated by an act of the General Assembly of the State of Kentucky, approved March
14 5, 1850; that it has never been incorporated by or under the laws of the State of Tennessee, and that at the time of the bringing of this suit the petitioner was and now is a duly organized and existing corporation under the laws of the State of Kentucky; that it is the defendant in the above entitled suit; that the matter in dispute exceeds, exclusive of interests and costs, the sum of or the value of two thousand dollars ($2,000.00). That said suit is of a civil nature, it being a suit brought by the plaintiff, C. W. Garrett, administrator of T. W. Lewis, Jr., against your petitioner to recover $50,000.00 damages for the alleged wrongful killing of plaintiff's intestate, T. W. Lewis, Jr., while engaged as a brakeman on one of the defendant's trains doing an interstate commerce freight business between Bowling Green, in the State of Kentucky, and Paris, in the State of Tennessee.

Your petitioner further states that the plaintiff while personally a citizen of the State of Kentucky, qualified as administrator of T. W. Lewis, Jr., deceased, in Houston County, Tenn., and your petitioner avers and charges that the plaintiff was induced by the parents of the deceased to and did come to the State of Tennessee and qualify in the County Court of Houston County, Tenn., at the instance of the said parents of plaintiff's intestate, and for the sole purpose of preventing the removal of this case from this court to the United States Court for the Middle District of Tennessee, but petitioner states that, notwithstanding the plaintiff personally is a citizen of the State of Kentucky, yet that he sues in his official capacity as administrator, and has no personal interest in the controversy, and is, therefore, for the purpose of this suit, a citizen of the State of Tennessee under Chapter 501, of the Acts of the General Assembly of the State of Tennessee, 1903, to which reference is hereby made and for the time and purpose of this suit makes himself a citizen of Tennessee; therefore, by virtue of said act, and plaintiff's qualification thereunder, this is a controversy between citizens of different states and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that it was at the commencement of this suit and still is a citizen of the State of Kentucky, and the said C. W. Garrett, administrator of T. W. Lewis, Jr., who your petitioner avers was at the commencement of this suit

and still is, for the purpose of this suit, a citizen of the State of Tennessee, in which state this suit was brought, and that both the said C. W. Garrett, administrator of T. W. Lewis, Jr., deceased, under the laws of Tennessee, officially, but not personally, and your petitioner was actually interested in said controversy.

Petitioner further avers that the deceased died leaving no widow or children, and that, under the laws of the United States, under which his administrator must recover, if petitioner is liable to anyone in damages for the death of plaintiff's intestate, that the parents of the deceased are the sole beneficiaries; that said parents are citizens of and residents of Tennessee, and that plaintiff qualified as administrator aforesaid at their instance and for the sole purpose of preventing the removal of this case from the state to the Federal courts.

Your petitioner further avers that this suit is brought to recover damages for the alleged wrongful killing by petitioner of T. W. Lewis, Jr., deceased, under what is known as the employers' liability act of Congress of the United States of America, of April 22, 1908, while he was engaged as a brakeman in the employ of the defendant engaged in interstate commerce, between points in the State of Kentucky and points in the State of Tennessee, and that it involves the construction of the said act of Congress and the liability of your petitioner for said death under and by virtue of said act of Congress, approved April 22, 1908, and is, therefore, a question for the determination of the courts of the United States.

Your petitioner further avers that said Circuit Court of Houston County is a court of the said State of Tennessee; that this suit is now pending in said court; that this petition is filed in said court at the time or before your petitioner is required by laws of the State of Tennessee or the rules and orders of said state court in which this suit is brought to answer, plead or demur to the declaration, or complaint of the plaintiff.

Your petitioner further avers that since this suit or action involves a construction of said act of Congress of the United States of America, and the liability of your petitioner under and by virtue of said act of Congress of the United States of America, that it is a proper case for the sole determination of the United States and, therefore, it should be removed and transferred from the honorable court to the United States Circuit Court for the Middle District of Tennessee, at Nashville, Tenn. And to this end and for the purpose of removing this cause from this court to the United States Circuit Court for the Middle District of Tennessee, at Nashville, and for the reasons above set out and stated, your petitioner offers herewith a bond with good and sufficient surety for its entering in the Circuit Court of the United States for the Middle District of Tennessee, at Nashville, Tenn., on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said United States Court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and for your petitioner then and there appearing and entering special bail, if special bail was originally requisite therein.

Your petitioner prays that this court proceed no further herein, except to make an order of removal and to accept said surety and bond or require other and satisfactory bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Middle District of Tennessee at Nashville, Tenn.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By MICHAEL SAVAGE, *Attorney.*

STATE OF TENNESSEE,
Montgomery County:

I, Michael Savage, being duly sworn, do say that I am the attorney for the Louisville & Nashville Railroad Company, the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

MICHAEL SAVAGE.

Sworn to and subscribed before me, this the 31st day of March 1910.

SIDNEY BOONE,
Clerk Circuit Court of Houston County.

Bond.

In the Circuit Court of Houston County, State of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Know all men by these presents, that the Louisville & Nashville Railroad Company, as principal, and Michael Savage as surety, are held and firmly bound unto C. W. Garrett, administrator of T. W. Lewis, Jr., deceased, and all other persons whom it may concern, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, representatives and assigns, jointly and severally, firmly by these presents.

17 Yet upon these conditions: The said Louisville & Nashville Railroad Company, having petitioned the Circuit Court of Houston County, State of Tennessee, for the removal of a certain case therein pending wherein C. W. Garrett, administrator of T. W. Lewis, Jr., is plaintiff, and the Louisville & Nashville Railroad Company is defendant, to the Circuit Court of the United States in and for the Middle District of Tennessee.

Now, if the said Louisville & Nashville Railroad Company, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said

Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall then and there appear and enter special bail in said suit, if special bail was originally requisite therein, then this obligation to be void; otherwise to be and remain in full force and virtue.

Witness our hands and seals this 31st day of March, 1910.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

[SEAL.] By MICHAEL SAVAGE, *Attorney.*

[SEAL.] MICHAEL SAVAGE, *Surety.*

Justification of Surety.

STATE OF TENNESSEE,
Houston County:

I, Michael Savage, of said county, the surety named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of Tennessee, and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in said state, liable to execution, of the value of more than five hundred dollars.

MICHAEL SAVAGE.

Sworn to and subscribed before me this 31st day of March, 1910.

SIDNEY BOONE,
Clerk Circuit Court, Houston County, Tennessee.

Entry for Minutes.

C. W. GARRETT, Administrator, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

The defendant, the Louisville & Nashville Railroad Company, by its attorney, presented in open court its petition for the
18 removal of this suit from this court to the Circuit Court of the United States for the Middle District of Tennessee, and also a bond, with good and sufficient surety, in the penalty of $250, conditioned as required by the act of Congress in such case made and provided; and this being at, or before, the time said defendant is required by laws of the State of Tennessee, or the rule of this court, to answer or plead to the declaration of complaint of the plaintiff in this suit, it is ordered and adjudged by the court that said petition be filed, that said bond (which has been duly proven in open court) be accepted, that this suit be removed from this court to the Circuit Court of the United States for the Middle District of Tennessee, at Nashville, that the clerk of this court forthwith transmit to that court a full, true and perfect copy of the record of this suit,

duly certified according to law, that no further proceedings be had in this suit in this court.

Filed March 31, 1910.

SIDNEY BOONE,
Clerk of the Circuit Court of Houston County.

Bill of Costs.

State and county tax	$5.00
Clerk fees—issuing summons, 75c; bond, 50c; docketing, 30c; filing dec., 25c; filing pet. to remove, 25c; affidavit, 25c; bond for removal, 50c; order of removal, 25c; entering pet. on min., $2.00; making transcript to U. S. Court, $10.00; postage and carriage, 25c; seal and certificate, $1.00	16.30

Officer's Cost.

C. D. French, sheriff, ex. summons	1.00
	$22.30

STATE OF TENNESSEE,
Houston County:

To the Sheriff of Houston County, Greeting:

You are hereby commanded to summon the Louisville & Nashville Railroad Company, a corporation under the laws of Kentucky, if it be found in your county, to appear before the judge of our circuit court to be held for the County of Houston, at the courthouse in the town of Erin, Tennessee, on the fourth Monday of March, next, then and there to answer C. W. Garrett, a citizen of the State of Kentucky, as the administrator of T. W. Lewis, Jr., by appointment in Stewart County, Tennessee, in an action to his damage in the sum of ($50,000.00) fifty thousand dollars.

19

Herein fail not, and have you then and there this writ.

Witness Sidney Boone, clerk of our said court, at office, the fourth Monday in November, A. D. 1909.

(Signed) SIDNEY BOONE, *Clerk.*

Know All Men by These Presents, That we, C. W. Garret, as administrator of T. W. Lewis, Jr., and H. N. Leech, security, are jointly and severally held and firmly bound unto the Louisville & Nashville Railroad Company, in the penal sum of two hundred and fifty dollars, to be held void on condition that the said C. W. Garrett as said administrator, doth with effect prosecute an action for damage which he is about to commence in the Circuit Court for Houston County against the said Louisville & Nashville Railroad Company, or pay all such costs and damages as may at any time be adjudged against the said Garrett as said administrator for failure so to do.

Witness our hands and seals this the 8th day of February, 1910.

(Signed) C. W. GARRETT, [L. S.]
As Administrator of T. W. Lewis, Jr.
H. N. LEECH, [L. S.]
Security.

(Endorsed:) C. W. Garrett, Adm'r of T. W. Lewis, Jr., vs. the Louisville & Nashville Railroad Company. Summons. Issued 21st day of March, 1910. (signed) Sidney Boone, Clerk. Officer's return. Came to hand when issued and executed by reading the within summons to J. D. Hurt, Ag't for the Louisville & Nashville Railroad Company at Erin, Houston County, Tennessee, as commanded. C. D. French, sheriff. March 21, 1910. H. N. Leech, plaintiff's attorney.

I, Sidney Boone, clerk of the Circuit Court of Houston County, Tennessee, certify that the foregoing is a true and perfect copy of the record in the above styled case, as appears of record in my office. This April 2, 1910.

[SEAL.] SIDNEY BOONE, — *Cir. Ct.*

Transcript endorsed: C. W. Garrett, administrator of T. W. Lewis, Jr., vs. Louisville & Nashville Railroad Company. Transcript Houston County Circuit Court. Declaration included. Filed April 4, 1910. (Signed) H. M. Doak, Clerk.

20 *Pleas.*

The following plea was filed:

In the United States Court for the Middle District of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The defendant, the Louisville & Nashville Railroad Company, comes and for plea to plaintiff's declaration, consisting of three counts, says:

I.

It is not guilty as charged in any one or all of said counts.

II.

Defendant for further plea says, that the proximate cause of the accident complained of was the negligence of the plaintiff's intestate in putting himself in an extra hazardous position and out of the line of his duties.

Defendant joins plaintiff in asking a jury to try the issues.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.
(Signed) By JNO. B. KEEBLE.
(Signed) MICHAEL SAVAGE.

(Endorsed:) No. 3633. C. W. Garrett, Administrator, vs. Louisville & Nashville Railroad Company. Plea filed Sept. 19, 1910 H. M. Doak, Clerk.

Replication.

On Sept. 30, 1910, the following replication was filed:

C. W. GARRETT, Administrator, etc.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

For replication to plea No. 2, filed in this case, plaintiff says, the defense relied on is no bar to the action.

For further replication to said plea No. 2, plaintiff takes issue on the truth thereof, and asks for a jury as in his declaration.

(Signed) H. N. LEECH,
Attorney, etc.

21 (Endorsed:) No. 3633½. C. W. Garrett, Administrator, vs. L. & N. R. R. Co. Replication filed Sept. 30, 1910. H. M. Doak, Clerk. By F. B. McLean, D. C.

On November 9, 1910, the following order was entered:

3633½.

C. W. GARRETT, Administrator,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Came the parties by attorneys and the cause coming on to be heard upon the issues joined, *and* thereupon came a jury of good and lawful men, to-wit: J. C. King, A. C. Christian, A. M. Williams, Chas. Williams, Mayhew Dodson, S. K. Moulder, B. F. Hager, Robert Thompson, R. L. Watson, John C. Sawyers and J. T. Chilton, and who, after being duly elected, impaneled and sworn well and truly to try the issues joined and who after hearing the evidence in the cause were respited until tomorrow morning.

(Entered.) Book GG, page 499. November 9, 1910.

On November 10, 1910, the following order was entered:

3633½.

C. W. GARRETT, Administrator,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Came *and* again the parties by attorneys and the jury heretofore impaneled in the cause, and who after hearing the argument of counsel and the charge of the court, upon their oaths do say that they cannot agree. It is therefore ordered by the court that B. F. Hager, a juror, be withdrawn and a mistrial entered.

(Entered.) Book GG, page 500. November 10, 1910.

The following order was entered May 17, 1911.

3633½.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Came the parties in proper person and by attorney, and the cause coming on to be heard upon the issues joined, *and* came also a jury of good and lawful men, to-wit: Red Haskins, J. P. Binkley, W. R. Harber, G. W. Preston, J. N. Adams, John Schild, Ab. Gordon, J. L. Bryan, J. T. Larke, A. M. Petway, Newton Davis and Geo. Sherrill, and who, after hearing a part of the evidence in the cause, were respited until tomorrow morning.

(Entered.) Book GG, page 648.

22 The following order was entered May 18, 1911.

3633½.

C. W. GARRETT, Administrator of T. W Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Came the parties again in proper person and by attorneys, and the jury heretofore impaneled in the cause, who, after hearing the rest of the evidence, the argument of counsel and the charge of the court, upon their oaths do say that they find the issues in favor of the defendant and against the plaintiff.

(Entered.) Book GG, page 649.

Motion for New Trial.

The following motion for a new trial was filed:

C. W. GARRETT, Administrator,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion for a New Trial.

In this case the plaintiff comes and moves the court for a new trial, and for causes and grounds thereof says:

I.

It was error for the court, upon the objection of the defendant, to exclude the following evidence from the deposition of W. H. Binkley, a witness for plaintiff—speaking with reference to the doctor coming there—

"State whether he was suffering any or not?

"A. Well, he didn't seem to be suffering a great deal. He said he wanted us to get him out from under there. He said he thought he was just lying under there. I thought he was, too, but when we went to dig him out, I saw he was more than hung.

"Q. What was his condition under there?

"A. Burned and mashed by the heat of the boiler and weight.

"Q. After you finally got him out, what indication of suffering did he show?

"A. He showed a great deal of suffering, as soon as they began to raise the boiler off; after the wrecker got there, they set jacks under there and raised the boiler, and as soon as they began to relieve him of the weight, he began to flounce around with his body, looked like he was in great agony. The doctor gave him some kind of dope, or something, to relieve his pain.

"Q. Gave him something?

"A. He did; gave him something, yes. I don't know what it was."

II.

It was error for the court to exclude the deposition of Dr. R. D. Cunningham offered by plaintiff, on exception made by defendant. This deposition concerned the condition, etc., of decedent Lewis after the doctor reached him, what he did for him, etc., up to his death.

III.

It was error in the court to permit defendant upon cross-examination of W. B. Davis to prove the life expectancy of deceased's father and mother.

IV.

After the conclusion of the testimony in this case defendant's attorney, Mr. Keeble, moved the court for peremptory instructions on the following grounds:

"First. This declaration is a declaration for the injury to the

deceased person himself, and not for any damages to the next of kin, the father and mother, as provided by statute.

"Second. There is no evidence of any pecuniary loss sustained by the beneficiaries, which is essential in a cause of action of this kind.

"Third. There is no allegation of any pecuniary loss in the declaration sustained by the beneficiaries.

"Fourth. That when the deceased went in the engine at the time of descending the grade in question, it being uncontroverted in the evidence that it was his duty to be upon the top of the train, he assumed the risks of that position, notwithstanding the employers' liability act of 1908, and his administrator cannot recover for the reason that an employé not only assumes the ordinary risks of the employment, but under the law he assumes the ordinary risks of any position he takes outside of the scope of his employment, when he is not required by the master to take a position of greater peril, or of peril."

Before passing on this motion the court asked this question of Mr. Keeble:

"Now, to what extent is your motion to exclude the evidence, or your objection? What is your motion to exclude."

24 Mr. KEEBLE: "My motion was to exclude all evidence of any pecuniary value of the life, in so far as his capacity to earn money, or loss that had been sustained, of his expectancy of age, any money, or pecuniary in character, or could be estimated in money."

Thereupon the court said:

"Well, I sustain the motion and exclude the evidence."

Mr. LEECH, counsel for plaintiff:

"Now, I understand the motion is to take the case from the jury, if the court please?"

The COURT: "I haven't yet done so. I have now sustained the motion to exclude the evidence looking to the earning capacity of the deceased, and the pecuniary benefit of service that might have been reasonably expected to be received by his parents from a continuance of his life. I sustain that motion, as a matter of pleading, on the ground that the declaration does not allege any special damages of that character, that makes evidence on those matters competent, and I do so especially on the authority of the case of Thompson vs. Chicago Railroad Company, 144 Fed., 845, and the other cases cited in Note 12, in 13 Cyc., page 343, on the question of pleading."

To the foregoing action of the court plaintiff took exception. This action of the court was error, and is assigned as such on this motion.

V.

After sustaining the motion to exclude the evidence mentioned under the foregoing head No. IV, the court sustained the motion for peremptory instructions to the jury to return a verdict for defendant—which the jury did. In sustaining this motion the court said that the act of Congress of April 22, 1908, did not permit the jury

to estimate the value of the life of the decedent, and that it did not provide for the survival of the cause of action of the deceased wherein such damages could be recovered, and that such damages could not be recovered in this action brought by the personal representative for the benefit of the father and mother. To said action of the court in sustaining said motion for peremptory instructions upon any one or all of said four grounds, defendant excepted, and assigns said action as error on this motion.

Plaintiff respectfully asks the judgment of the court on the foregoing motion.

H. N. LEECH, *Attorney.*

25 (Endorsed:) 3633½. C. W. Garrett, admr., vs. L. & N. R. R. Motion for a new trial. Filed May 19, 1911. H. M. Doak, Clerk, by F. B. McLean, D. C.

On June 12, 1911, the following order was entered.

In United States Circuit Court, Middle District of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

This cause came on to be heard on May 29, 1911, before Hon. Edward T. Sanford, Judge, upon the motion of the plaintiff for a new trial of this cause, for reasons set forth in said motion, and was argued by counsel, and the court being duly advised in the premises doth overrule said motion, to which ruling of the court said plaintiff, by his attorney, excepts.

It is therefore considered and adjudged by the court that said defendant go hence without day and recover of the plaintiff and his surety, H. N. Leech, on the cost bond its costs herein expended, and that said plaintiff pay his own costs, to which judgment of the court said plaintiff, by his attorney, excepts.

And for good cause shown, leave is given the plaintiff to prepare and file and have allowed and signed his bill of exceptions according to the rules and practice of this court. This judgment is entered as of May 29, 1911, nunc pro tunc.

June 12, 1911. Enter

(Signed)

SANFORD, *J.*

Approved:

H. N. LEECH,
For Plaintiff.
JNO. B. KEEBLE,
For Defendant.

(Endorsed:) No. 3633½. C. W. Garrett, admr., vs. L. & N. R. R. Co. Judgment. Entered June 12, 1911. Book GG, Page 658.

26 *Bill of Exceptions.*

The following bill of exceptions was filed:

Circuit Court of the United States for the Middle District of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that afterward, to-wit, on the 18th and 19th days of May, 1911, at a stated term of said court in and for the Middle District of Tennessee, His Honor, Edward T. Sanford, District Judge, the issues joined in the above stated case between the parties thereto came on to be heard before the said judge and a jury impaneled to try the same, and upon the trial of the issues presented in the pleadings the following evidence was offered by the plaintiff to maintain her cause of action as set out in her declaration in said case, and the following evidence by the defendant to sustain the defense to the cause of action set out in said declaration, and the following action of the court in instructing the jury to return a verdict for the defendant upon motion of defendant by attorneys after the conclusion of the introduction of all said evidence:

Plaintiff introduced first:

Plaintiff's Proof.

On the trial of this case the plaintiff first offered in evidence and read to the jury letters of administration in the following words, to-wit:

"STATE OF TENNESSEE,
"Stewart County:

"To C. W. Garrett, a citizen of Christian County:

"Whereas, it appears to the court, now in session, that T. W. Lewis, Jr., has died leaving no will, and the court being satisfied as to your claim to the administration and you having given bond and qualified as directed by law, and the court having ordered that letters of administration be issued to you; these are, therefore, to authorize and empower you, the said C. W. Garrett, to take into your possession and control all the goods, chattels, claims and papers of the said intestate, and return a true and perfect inventory thereof to our next County Court, or within ninety days from the date hereof; to
27 collect and pay all debts, and to do and transact all the duties in relation to said estate which lawfully devolve on you as administrator; and after having settled up said estate, to de-

liver the residue thereof to those who have a right thereto by law. Herein fail not.

Witness:

Witness, R. L. Lowry, clerk of said court, at office, this 4th day of November, 1909, and the 135th year of American Independence.

[SEAL.] (Signed) R. L. LOWRY,
Clerk of County Court.

Endorsement on back: A true copy. Letters of administration. C. W. Garrett, Administrator of T. W. Lewis, Jr. Issued November 4, 1909. R. L. Lowry, Clerk.

I, D. K. Coppege, Clerk of the County Court of Stewart County, Tenn., certify that this is a true copy of the letters of administration issued to C. W. Garrett, administrator of T. W. Lewis, Jr., as appears of record in my office.

[SEAL.] D. K. COPPEGE, *Clerk.*

The plaintiff thereupon read in evidence the depositions of J. W. Province, W. H. Binkley, A. B. Gilson, as follows, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee, Saturday, October 29, 1910.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE R. R. Co.

The Depositions of J. W. Province, A. B. Gilson, and W. H. Binkley, Taken at the Office of S. T. Ford, Notary Public and Stenographer, Vanderbilt Building, Nashville, Tenn., on Saturday, October 29, 1910, by Consent, in the Above-styled Cause, to be Read as Evidence in Behalf of the Plaintiff. Caption, Certificate, and All Formalities Waived.

Said Witness, J. W. PROVINCE, having been first duly sworn, deposed as follows:

28 Direct examination.

By Mr. LEECH, for plaintiff:

Q. State your age and residence and occupation?
A. Twenty-four years old; live at Paris, Tenn.; train dispatcher.
Q. Were you train dispatcher at Paris, Tenn., in the service of the L. & N. Railroad Company when the collision of trains took place near Big Sandy resulting in the death of T. W. Lewis, Jr.?
A. Yes, sir.
Q. What were the numbers of the two trains in that collision?
A. Second No. 115 and No. 112.
Q. From what point to what point was 115 running?

A. From Bowling Green, Ky., to Paris, Tenn.

Q. From Bowling Green, Ky., to Paris, Tenn.?

A. Yes, sir.

Q. What is the distance from Bowling Green, Ky., to Paris, Tenn.?

A. 133 miles, I believe it is.

Q. Where was train No. 112 running to, and from what point?

A. From Paris, Tenn., to Bowling Green, Ky.

Q. Train 115 was taken charge of by a new crew at Bowling Green, having come from Louisville, Kentucky, was it not?

A. Well, the train was made up there in the Bowling Green yards, I don't know exactly where the freight come from; I suppose it come off of the first division somewhere.

Q. And 112 started from Memphis, made up at Memphis, was it?

Yes, sir.

Q. Both these trains had regular runs on the L. & N. Railroad Company?

A. 112 did. 115's crew was a "slop freight crew."

Q. What I mean, both these trains were regular runs on the line of the L. & N. Railroad from Bowling Green to Paris, and from Paris to Bowling Green?

A. Yes, sir.

Q. And when you speak of "slop freight trains" you mean crews that were used in any service?

A. Crews that they use in any service. You see, the older crews, older men, they have regular runs, according to age, preferred runs, fast freight runs and local runs, and these crews we use for any service they call "slop freight crews."

29 Q. But this train was running in the carrying on of business from Bowling Green, Kentucky, to Paris, Tennessee?

A. Yes, sir.

Q. And then would go on to Memphis from Paris?

A. Well, it was according to where the freight went. The crew didn't go to Memphis.

Q. I mean, the train?

A. It is possible they might have a train to be delivered to the N. & C. at Paris there, and not go on to Memphis at all.

Q. You say that 112 had the right of way?

A. Yes, sir.

Q. What is meant by that?

A. It means it is a second class train. Trains are classified in the time card, and 112 was a second class train; and we only have four classes of trains on our division, and trains that are not first class, why, they are supposed to get out of the way of No. 112; they have the right of track over them.

Q. What order did you give to train No. 115, going south, from Bowling Green, Kentucky, to Paris, Tennessee, that night at Erin, Tennessee?

A. I gave an order that 112, engine 772, should wait at Faxon until 12:20 a. m.

Q. What was the number of that order?

A. 135, I believe, isn't it, Mr. Keeble? Haven't you got it?

Mr. KEEBLE: 135.

Q. Please copy that order, if you have it; copy it in your deposition.

A. "No. 112, engine 772, wait at Faxon until twelve-twenty (12:20) a. m. for second No. 115, engine 863."

Q. Was that same order to engineer and conductor on train 112?

A. Yes, sir.

Q. At what point?

A. Paris.

Q. Now, what other order did you give to these two trains after giving this order to the one at Erin, Tennessee, and the one at Paris, as they were running that night?

A. I gave 112 at Paris and second 115 at Stewart, order No. 140, which read for "No. 112, engine 772, wait at Big Sandy until twelve forty (12:40) a. m. for second No. 115, engine 863."

Q. You gave that to the dispatcher at Stewart, did you?

30 A. Operator at Stewart, yes, sir.

Q. That is what I mean, operator at Stewart, and to the operator at Paris?

A. Yes, sir. I gave them another one, too; do you want me to tell about that?

Q. That will come next. Now, what other order did you give before the collision took place?

A. Gave order 141 to 112 at Paris and second 115 at Stewart, which read: "No. 112, engine 772, wait at Faxon until twelve-fifty (12:50) a. m. for second 115, engine 863. Orders 135 and 140 are annulled."

Q. To what operator did you give this order 141, revoking orders 140 and 135?

A. At Paris and Stewart. I gave it to operator Schnabel, at Stewart, and operator Claypool, I believe it was, at Paris.

Q. Paris or Big Sandy?

A. Paris.

Q. Did both these operators make any report to you on receipt of this order 141 annulling the other two?

A. Yes, sir. They repeated them back to me like they were sent.

Q. State what the operator is required to do in making certain the correctness of orders like these when he receives them?

A. After getting the train crew's signature to the orders they are supposed to check the vital points back to the train dispatcher, in order if there is any error occurs that there will be a chance of catching it.

Q. And the operator at Stewart did check back the vital points of order 141 to you correctly?

A. Yes, sir.

Q. It afterwards resulted that he had committed a mistake in delivering 141 to the conductor and engineer of No. 115, did it not?

A. No, sir, not to me. There was no mistake discovered until after the accident occurred.

Q. That is what I mean.

A. Well, I thought you meant at the time he was sending the orders.

Q. That is what I mean. What mistake was afterwards discovered upon the part of this operator at Stewart as to order 141?

A. It was discovered that in order 141 he had it No. 40, is annulled, when it should have been order 140.

Q. This matter was investigated by the railroad company through its officials, was it?

A. Yes, sir.

31 Q. Were you before the investigation?

A. Yes, sir.

Q. And that fact was made certain that he had made that error, was it not, in that investigation?

A. Yes, sir.

Mr. KEEBLE: We note an exception to that testimony, as hearsay and incompetent, and not the best proof of what transpired at Stewart.

Q. After this investigation, state whether or not the operator Schnabel—Leo Schnabel—at Stewart and the engineer and conductor on train 115 were discharged from the service of the L. & N. R. R. Co.?

A. State whether they were discharged?

Q. Yes, sir.

A. Yes, sir, they were all discharged.

Mr. KEEBLE: I except to that as being incompetent, for the reason that evidence of discharge is not competent to prove negligence.

Q. Mr. Province, at what time do the orders for a given day begin and what time does it run?

A. Begins at twelve o'clock—begin numbering at twelve o'clock midnight with No. 1, and run until twelve of the next midnight.

Q. You know nothing about the collision other than what you heard—you did not go to the scene of the accident?

A. No, sir.

Cross-examination.

By Mr. KEEBLE, for defendant:

Q. Mr. Province, do you know, as a matter of fact, where this train started from on the night of the accident—No. 115—of your own knowledge?

A. Started from Bowling Green, yes, sir.

Q. Do you know where Lewis got on the train?

A. No, sir, I do not.

Q. Do you know where these cars that were in the train were taken up by the train crew?

A. No, not all of them, they pick up and set out on the line you know all the way over the division, sometimes.

Q. You couldn't say where the cars that were in the train when the accident happened were taken up?

A. No, sir, I could not.

And further the deponent saith not.

(Signature waived.)

Sworn to before me when given this October 29, 1910.

[SEAL.] (Signed) S. T. FORD,
Notary Public.

32 Said witness, A. B. GILSON, having been first duly sworn, deposed as follows:

Direct examination.

By Mr. LEECH, for plaintiff:

Q. Mr. Gilson, were you an engineer on the train going south at the time — the collision near Big Sandy in September of last year when T. W. Lewis, Jr., was killed?

A. Yes, sir.

Q. Where did that train start from?

A. Bowling Green.

Q. Bowling Green, Ky.?

A. Yes, sir, Bowling Green, Ky.

Q. To what point were you to carry it as engineer?

A. Paris, Tenn.

Q. State how many brakemen you had on that train when you left Bowling Green.

A. Had two brakemen.

Q. Who were they?

A. This man Lewis, front brakeman, and Bob Collier was the rear brakeman—the flagman.

Q. Who was the conductor on that train?

A. Conductor Jackson—J. R. Jackson.

Q. Where is Jackson now?

A. I couldn't tell you, sir; I have no idea.

Q. Where is Collier?

A. I don't know that, either; they have both left Bowling Green since I was there.

Q. All these different members of that crew left with you that night from Bowling Green to go to Paris, carrying this freight train, did they?

A. Yes, sir.

Q. The train was made up at Bowling Green, was it?

A. Yes, sir.

Q. Made up of, how many cars, do you think that night, did you have?

A. I don't remember exactly, but it seems to me like there was about twenty-three or four cars in our train; I know we had that many, but I couldn't say just exactly how many.

Q. What was your train—was it a merchandise train?

A. Yes, sir, it was mostly merchandise, I think.

Q. Made up of cars brought from other points to Bowling Green, was it?

A. Yes, sir.

Q. Did you pick up any cars between Bowling Green and Paris that night?

33 A. Yes, sir; we done some work at Guthrie and Russellville.

Q. Both of those points in Kentucky?

A. Yes, sir.

Q. Now, until the collision, did you do any more work?

A. Not after we left Guthrie, we didn't.

Q. Have you a copy of the order your train received when you got to Erin?

A. Yes, sir.

Q. What was the number of that order?

A. 135.

Q. I hand you this order No. 135, and ask you to make it a part of your deposition, the stenographer copying it as your answer.

A. Yes, sir, I do so.

(The said order No. 135 is in writing and printing as follows—the *written* portions being underscored in the following copy:)

Revised July, 1898.

Form 31. Form 31.

Louisville & Nashville Railroad Company.

Train Order No. 135.

Chief Train Dispatcher's Office, Paris, 9-26, 1909.

To Conductor and Engineman

Train 2nd 115. At *Erin* Station.

No. 112 *Eng.* 772 *wait at Faxon until Twelve Twenty* 12:20 *a. m. for 2nd No.* 115 *Eng.* 863.

Huskleberry.

Conductor and engineman must each have a copy of this order. Time received 11:11 p. m. Q. K. given at 11:12 p. m.

Conductor	Engineman	Train	Made	At	Received by
Jackson	Gilson	2/115	Com.	11:12 p. m.	Shelton

Q. That was received by you and the conductor at Erin, was it?

A. At Erin, yes, sir.

Q. Well, when you got at Stewart, did you receive another order; if so, what number was it?

A. Received two others, 140 and 141.
Q. At Erin?
A. No, sir; at Stewart. Only one at Erin.
Q. I hand you order No. 140, stating the meeting point to be at Big Sandy, and that No. 112 would wait at that point until
34 12:40 a. m. for No. 115, and ask the stenographer to copy that in as your answer?
A. Yes, sir; I do so.

(The said Order No. 140 is in handwriting and printing as follows—the *handwritten* portions being underscored in the following copy:)

Revised July, 1898.

Form 31. Form 31.

Louisville & Nashville Railroad Company.

Train Order No. 140.

Chief Train Dispatcher's Office, Paris, 9-26, 1909.
To Conductor and Engineman,
Train 2d 115
At *Stewart*
Station.

No. 112 Eng. 772 wait at Big Sandy until twelve forty, 12:40 a. m. for 2d No. 115, Eng. 863.

Huckleberry.

Conductor and Engineman must each have a copy of this order. Time received 11:40 p. m. O. K. given at 11:41 p. m.

Conductor	Engineman	Train	Made	At	Received by
Jackson	Gilson	2/115	Com.	11:55 p. m.	Schnabel

Q. You say that was received when you were at Stewart?
A. Yes, sir.
Q. Now, before you left, did you receive another order, and if so, what number was that?
A. Yes, sir; we received one, No. 141.
Q. This is Order 141 I will ask you to copy and state whether it reads thus: No. 112, engine 772, wait at Faxon until 12:50 a. m. for second 115, engine 863. Order No. 40 and 135 are annulled?
A. Yes, sir.

(The said Order No. 141 is in handwriting and printing as follows—the *handwritten* portions being underscored in the following copy:)

Revised July, 1898.

Form 31. Form 31.

Louisville & Nashville Railroad Company.

Train Order No. 141.

Chief Train Dispatcher's Office, Paris, 9-26, 1909.
To Conductor and Engineman,
Train 2d 115 At *Stewart* Station.

35 *No.* 112 *Eng.* 772 *wait at Faxon until twelve fifty* 12:50 *a. m., for 2d No.* 115, *Eng.* 863. *Orders Nos.* 40 *and* 135 *are annulled.*

Huckleberry.

Conductor and Engineman must each have a copy of this order. Time received 11:45 *p. m.* *O. K.* given at 11:46 *p. m.*

Conductor	Engineman	Train	Made	At	Received by
Jackson	Gilson	2/115	Com.	11:55 p. m.	Schnabel

Q. When you received this order state whether you had gotten ready to leave and where you were at Stewart?

A. Just outside of the telegraph office, fixing to get on the engine, when the boy called me back to give me this order.

Q. The operator?

A. The operator; yes, sir.

Q. His name was Schnable, was it?

A. Schnabel; yes, sir.

Q. You were just on the eve of leaving under order 140?

A. Yes, sir.

Q. And when you got this order what did you do?

A. After I received the order, after I read it, I asked him to find out what this order 40 was; that I hadn't had any such order as that in my possession that day, and he tried to find out from the dispatcher, so he said, what the order was, and he couldn't tell us; there wasn't anything more for us.

Q. Then what did you say?

A. I asked him again the second time to find out what this Order 40 was, and the dispatcher says there is nothing more for you, go ahead.

Q. Was the conductor present and received a copy of the same order?

A. Yes, sir.

Q. What did the conductor do then?

A. He came out, got on the engine with me and we left.

Q. Did he say anything about going—the conductor?

A. Yes, sir; he said, go on, let's go, if we couldn't find out what the order was, or something to that effect.

Q. How far was it from Stewart to Faxon, do you know?
A. Let's see, I have about forgotten; I will be doggoned if I ain't forgotten how far it is exactly. It has been so long since I looked at the time card I have forgotten the numbers of the stations over there.
36 Q. Did any collision result from this change of orders and this error?
A. Yes, sir.
Q. Whereabouts?
A. Just a mile and a half north of Big Sandy.
Q. Faxon was between Big Sandy and Stewart, was it?
A. Yes, sir.
Q. You passed Faxon and found no train on the side track, or there any where?
A. No, sir.
Q. Now, between Faxon and Big Sandy was there another siding?
A. Yes, sir.
Q. Where was that?
A. At the top of Benton Hill, a siding called Benton Cut.
Q. Did you find any train there?
A. No, sir.
Q. Did you go ahead, thinking you could make Big Sandy?
A. Yes, sir.
Q. Where did you suppose 112 was?
A. Big Sandy.
Q. You supposed it was there under order 140, did you?
A. Yes, sir.
Q. Well, if it had been there, you would have made that without a collision?
A. Yes, sir.
Q. As soon as you discovered the opposing train, what did you do?
A. I applied my brakes and jumped off.
Q. Did you put on the brakes to their full capacity?
A. Yes, sir; I put them on in emergency.
Q. Were you hurt in that wreck?
A. Yes, sir; I was hurt some.
Q. Did you see young Lewis after he was hurt?
A. No, sir; never did.
Q. You were being cared for yourself, were you?
A. Yes, sir; I was taken to the caboose.
Q. What did you say?
A. I was taken back to the caboose.
Q. Do you know where he was on the train when the collision took place?
A. No, sir; I couldn't say exactly where he was.

By Mr. LEECH, for plaintiff:

(The following portion of this examination is taken as if on rebuttal, and by consent of defendant's counsel it was here read as if on rebuttal.)

37 Q. Mr. Gilson, at that time, I mean the time of the accident, state if the time-table or schedule way-card had on it reading about this way: "When trains are descending grades, or approaching and passing through stations, flagmen and brakemen must be at their post on the top of the train. Brakemen, when riding on the engine, must obey the engineman's instructions?"

A. Yes, sir.

Q. Do you know whether that was in the book of rules or simply on the time table?

A. That is special instructions.

Q. On the time table?

A. On the time table, yes, sir; special instructions on the time table. I think there is an amendment to that of some kind in this new book of rules, but I don't know where it is. This was in the old book of rules at that time, but the new book of rules has made an amendment to it of some kind, but I don't know just where it was.

Q. How long have you been railroading?

A. About twelve or thirteen years.

Q. How long were you engineer?

A. Nearly four years.

Q. State whether you are acquainted with the way that rule is observed or not?

A. Yes, sir.

Q. State whether it is a custom for the brakeman to ride on the engine, and well known to conductors and engineers?

A. It was.

Q. Had it been that way ever since you have been in the railroad service?

A. Yes, sir.

Q. State whether the time table in force at this time mentioned any certain grades between Bowling Green, Kentucky, and Paris, Tennessee, specially directing the brakemen and flagmen to be on top of the train when descending those grades?

A. Yes, sir.

Q. What grades were they?

A. Cherry's, coming down there from St. Bethlehem—Cherry's, Clarksville and Tennessee Ridge.

Q. Were these long grades?

A. Yes, sir, all but Clarksville. Clarksville is not a very long grade; it is very steep, though.

Q. This collision took place on what is called Benton Hill?

A. Benton Hill.

38 Q. Or grade?

A. Yes, sir.

Q. Was that a short or a long grade?

A. It was about two miles and a half, I suppose.

Q. Now, state whether it was the custom in the running of the trains for the brakemen and flagmen to be on top while descending that grade?

A. Well, no, sir.

Q. As a matter of fact, has there ever been any serious effort made to enforce that rule?

A. Yes, sir; there have been special instructions about it; that is, at times they have instructed the men to keep the brakemen out on top, and such as that.

Q. At times; but I say, what has been the custom as to observing that rule?

A. Why, we never paid much attention to it; the brakeman always rode wherever he wanted to.

Q. And the time table specified certain grades?

A. Yes, sir.

Q. The first brakeman, whose actual orders is he under while the train is moving?

A. The engineer's.

Q. Did you have the full requirement as to air brakes on that train?

A. Yes, sir.

Q. What is the purpose of having a brakeman on top of the train when going down heavy grades, as specified?

A. To turn up the retaining valve and keep out a lookout for signals.

Q. Does he use the old-fashion brake?

A. No, sir; not while we are using air we do not.

Q. Can he use it?

A. Oh, yes; yes, sir.

Q. I mean, while the air brake is being used?

A. He could use it, but it don't do any good, and it is against instructions for him to use it.

Q. If the air brake gets out of order, he then uses it?

A. Yes, sir.

Q. You say the retaining valve; just explain what you mean by that.

A. The retaining valve is supposed to retain the pressure in the brake cylinder; you retain a fifteen-pound braking pressure on the brakes while you release and recharge.

Q. In other words, it is to retain in full power so much of the former application of the brake as is retained by turning the retaining valve?

39 A. Retaining the power already made, the application that you have made at first. You see, if it wasn't for that retaining valve, when you release the brake, our train would get away from us—couldn't have any control over it.

Q. If the brakeman is on top and the air brake is out of order, is that called an emergency when he must use his old hand brake?

A. Yes, sir.

Q. Was the air brake on this train in perfect order that night?

A. Yes, sir; it was good train air.

Q. Where are those old hand brakes mostly used now?

A. Only while they are switching and setting out cars on the side-track.

Q. How many cars in your train were wrecked that night?

attempt to apply the air that you find it necessary to recharge your line, and you want the valves turned up?

A. Yes, sir.

Q. And then you call by signal to the brakemen on top of the train to apply these valves—turn on these valves?

A. Well, it is not necessary to do that on these specified places, because they know that is their business and know that is what they get out there for.

Q. But that is one of the duties, to turn them up?

A. Yes, sir.

Q. They are there on top of the train at these specified places to respond to the call of the hand brakes in case anything is not working satisfactorily with the air?

A. Yes, sir.

Q. And also to watch the cars to see if anything happens to them, to notify the engineer, and, furthermore, to turn up the retaining valves when you start to descend a grade?

A. Yes, sir. We have no signal, that is, a whistle, for them to turn up the retaining valves.

Q. That is their duty, dry so?

A. Yes, sir.

Q. So that when you start down a grade the brakemen, under the rules, should turn up these retaining valves?

A. Down Tennessee Ridge. Those three places, that is all?

41 Q. Don't turn up the valves at any place else?

A. No, sir.

Q. If anything should get wrong they would turn them up?

A. Not unless the engineer notified them.

Q. Where do you get the idea that you do not turn up the valves from the rules except on these three grades?

A. Don't need them, that is the reason; these places are specified.

Q. Is that a steep grade south of Benton?

A. Yes, sir; pretty steep grade.

Q. And two and a half miles long?

A. Yes, sir.

Q. So that if the brakeman is not on top of the train when descending the grade he is not doing what he is instructed to do and what the rules provide that he should do?

A. Yes, sir.

Redirect examination.

By Mr. LEECH, for plaintiff:

Q. When you speak of the officials under the rule undertaking to enforce the rule, you mean the circulars you have spoken of in your direct examination now and then?

A. Yes, sir.

Recross-examination.

By Mr. KEEBLE, for defendant:

Q. Don't you know it to be a fact that the Superintendent makes an effort to enforce these rules?

A. I couldn't tell you to save my life, only what I have heard; there was four or five, I don't remember which it was; I never did see any of the wreck at all.

Q. You didn't see them?

A. No, sir.

Cross-examination.

By Mr. KEEBLE, for defendant.

Q. Mr. Gilson, you say that under the rule you have quoted, it is the duty of the head brakeman, on descending grades, to be on top of the train?

A. Yes, sir.

Q. And in the time card special mention is made of the three grades which you mention?

A. Yes, sir.

Q. Did the rule apply generally to all grades?

A. Yes, sir.

Q. Now, Mr. Gilson, I believe you also stated that the officials of the railroad company tried to enforce that rule and called attention to it from time to time?

A. Yes, sir.

Q. But sometimes, or frequently, the brakeman did not obey them?

A. Yes, sir.

Q. Now, Mr. Gilson, I will ask you if it is not a fact that frequently, notwithstanding the fact that the air brakes are that way—in good condition—that they sometimes do not work?

A. Oh, yes; yes, sir.

Q. And no engineer can absolutely tell, until he applies
40 the air, as to just how well the brakes will hold at any particular time, can he?

A. No, sir.

Q. Now, in going down grade, or at any time when you are running the train, if it became necessary for any reason to put on the air, and you discovered that the air was not holding, I will ask you if you would not have sounded the whistle for the hand brakes at once?

A. I would; yes, sir.

Q. Isn't that one of the reasons why the company makes it a rule that the brakemen must be on top of the train on these occasions?

A. Yes, sir.

Q. So that they can apply the hand brakes in case anything happens?

A. In case of emergency; yes, sir.

Q. I will ask you if it is not another duty of the brakeman on top of the train to watch the cars in these particular cases, and in case they discover anything wrong with the cars, to signal the engineer?

A. Yes, sir.

Q. I will ask you if this sometimes doesn't occur: When you

A. Oh, yes; that is as an official.

Q. And other efforts, besides merely issuing circulars, have been made to enforce them, haven't they?

A. I suppose they notify them when they examine them; that is the examination.

Q. If they knew they disobeyed then they would discipline them, wouldn't they?

A. Oh, yes, I suppose they do; yes, sir.

And further this deponent saith not.

(Signature waived.)

Sworn to before me when given, this October 29, 1910.

[SEAL.] (Signed) S. T. FORD,
Notary Public.

Said witness, W. H. BINKLEY, having been first duly sworn, deposed as follows:

42 Direct examination.

By Mr. LEECH, for plaintiff:

Q. 1. Mr. Binkley, what is your age, residence and occupation?

A. Thirty-five years old. Live at Paris, Tennessee. Occupation, engineer of the L. & N. Railroad Company.

Q. 2. How long have you been in the service—I mean, how long have you been railroading?

A. I have been railroading since August, 1899.

Q. 3. What different places have you filled?

A. I have filled brakeman, fireman and engineer's place.

Q. 4. How long have you been an engineer?

A. Since 1901.

Q. 5. In the collision near Big Sandy, when T. W. Lewis, Jr., was killed, what train were you engineer on?

A. No. 112, northbound.

Q. 6. Where was that train coming from and going to?

A. From Paris to Bowling Green.

Q. 7. Have you copies of the orders that you were running under that night?

A. I have.

Q. 8. Between these two points?

A. Yes, sir.

Q. 9. Produce them and read them to the stenographer, will you? Take 135 first.

A. Order No. 135. September 26, 1909. Train No. 112, Paris, Tennessee. No. 112, engine 772, wait at Faxon until 12:20 a. m. for second 115, engine 863.

Q. 10. Now, take the second one?

A. Order No. 140. September 26, 1909. Train No. 112 at Paris, Tennessee. No. 112, engine 772, wait at Big Sandy until 12:40 a. m. for second 115, engine 863. 141 Paris, Tenn., September 26, 1909. Train 112, Paris, Tennessee. No. 112, engine 772, wait at

Faxon until 12:50 a. m. for second 115, engine 863. Orders Nos. 140 and 135 are annulled.

Q. 11. Which train had the right of way that night, your train or the train going south?

A. No. 112 northbound.

Q. 12. What is meant by having the right of way?

A. Well, superior class trains had rights over the inferior ones. Second 115 was an inferior class train to 112; 112 was a second-class train; 115 was third-class.

Q. 13. The second-class had to be at these designated points under these orders by the time mentioned, did it?

A. Third-class.

43 Q. 14. I mean third-class. Yours was second-class?

A. Yes, sir.

Q. 15. You received those orders at Paris, did you?

A. Yes, sir.

Q. 16. Did you receive any order at Big Sandy?

A. No, sir.

Q. 17. Were they all at Paris?

A. All at Paris.

Q. 18. Where did the collision take place?

A. About two miles north of Big Sandy.

Q. 19. On what—on a level or a grade?

A. It was on a grade, what is known as Benton Hill.

Q. 20. Mr. Binkley, as soon as you saw the opposing train what did you do?

A. I shut off the engine, called for brakes, applied my brakes in emergency, and jumped off.

Q. 21. Put on the full power of the brakes?

A. Yes, sir.

Q. 22. Was it possible to stop the collision?

A. No, sir; couldn't do it.

Q. 23. You were not hurt, I believe?

A. No, sir.

Q. 24. How many cars in your train were wrecked?

A. Three.

Q. 25. How many on the other train?

A. Three is the best of my understanding.

Q. 26. Where were those cars on the other train?

A. On the head end, next to the engine.

Q. 27. Where did you find young Lewis after the collision?

A. He was pinned under engine 863.

Q. 28. Just state in what condition you found him?

A. Found him lying on the—the engine was turned over on her left side, and he was sticking back under the boiler from his hips; his hips and legs sticking back under the boiler.

Q. 29. Any part of the cab over any part of his body?

A. Yes, sir; we pulled the cab away from around him; the cab had his head all bent up, and we pulled the cab away from him so he could lay his head around.

Q. 30. What effort did you make before the doctor got there towards digging him out?

A. We did all we could with what we had to dig him out with; sent across the country there and got a spade or maddock or something like that, and tried to dig him out.

Q. 31. How long after the collision before the doctor got
44 there?

A. I guess something near two hours.

Q. 32. Something near two hours before the doctor got there; you were present there and noticed his condition?

A. Yes, sir.

Q. 33. State whether he was suffering any or not?

A. Well, he didn't seem to be suffering a great deal. He said he wanted us to get him out from under there. He said he thought he was just laying under there. I thought he was, too, but when we went to dig him out I saw he was more than hung.

Q. 34. What was his condition under there?

A. Burned and mashed by the heat of the boiler and weight.

Q. 35. After you finally got him out, what indications of suffering did he show?

A. He showed a great deal of suffering as soon as they began to raise the boiler off; after the wrecker got there they set jacks under there and raised the boiler, and as soon as they began to relieve him of the weight he began to flounce around with his body; looked like he was in great agony. The doctor gave him some kind of dope or something to relieve his pain.

Q. 36. Gave him something?

A. He did; gave him something, yes; I don't know what it was.

(Questions and answers above 32 to 36, inclusive, objected to by defendant, which objection was sustained by the court, and to which action of the court plaintiff excepted.)

Q. 37. I don't know whether I asked you or not whether there would have been any collision or not if you had had your train at Big Sandy, under the first order—under the order as to Big Sandy, whether the other train would have made it or not?

A. Yes, sir; they would have made that order if I hadn't had the annullment of it.

Q. You went on under Order 141, leaving Big Sandy?

A. Yes, sir.

By Mr. LEECH for plaintiff: The following portion of this examination is taken with a view to be used as rebuttal, and by consent of the defendant's counsel it was read as if in rebuttal:

Q. Mr. Binkley, state whether or not it is the general habit or custom for brakemen, when they desire, to ride on the engine?

A. Yes, sir; they ride on the engine very near all the
45 time, only when they want to get back sometimes on the train to keep from shovelling down coal for the fireman.

Q. Frequently he is needed to assist the fireman in firing the engine or boiler?

A. Sometimes need them to shovel down coal; they don't have it to do unless they want to; it is left to their discretion. Most of them help.

Q. Have you observed it to be the general custom or habit of brakemen to ride on the engine, and is that known to the engineers and conductors of trains?

A. Yes, sir.

Q. I will ask you whether this is one of the rules of the company on that subject?

A. To ride on engines, you mean?

Q. No. I will read you this rule: "When trains are descending grades or approaching and passing through stations, flagmen and brakemen must be at their post on top of the train. Brakemen when riding on the engine must obey the engineer's instructions." Is that a rule?

A. Yes, that is a rule of the company.

Q. Where is that rule especially instructed to be observed on the time table between Bowling Green and Paris?

A. They are supposed to be out at grades and passing points and through telegraph offices, and supposed to be out at Tennessee Ridge, Clarksville and Cherry's to turn up retainers.

Q. Does the time table mention those specially?

A. Yes, sir; that is special instructions to be out on these points.

Q. These grades, after you go down them, is it customary for them to be on the engine when they get down there, if they want to?

A. No, sir; it is not necessary for them to get out there; they don't get out there unless they want to.

Q. They ride on the engine if they desire, do they?

A. Yes, sir.

Q. You say something about the retainers; explain what you mean by that?

A. That is a little valve that is fixed up on the end of the car, with a pipe to the triple valve. It has got a little handle on it. You turn that up and it retains the pressure on the brakes while you release the brakes; that has a fifteen-pound pressure on the brakes while you are releasing and recharging.

Q. And at these particular places you speak of, mentioned in the time table, they are supposed to require service of that kind, are they?

46 A. Yes, sir.

Q. The old hand brake, is that used; if so, how?

A. Well, it is not used on a line for handling a train. Trains are handled by air brakes. Hand brakes are only used now to hold a train anywhere, wherever you want to hold it, on a grade or on a sidetrack—set a car in on the sidetrack and set the brake, something like that.

Q. If the air brake should be out of fix, would you use it then in emergency?

A. Yes, you would have to use it then in case of emergency.

Cross-examination.

By Mr. KEEBLE, for defendant:

Q. Where do you work now?
A. C. Division of the L. & N., between Paris and Bowling Green.
Q. I believe you stated that under the rules of the company it is the duty of the brakeman to be on top of the train when descending all grades?
A. Well, that the company requires that.
Q. I believe you did state, however, that sometimes brakemen did not obey that rule?
A. No.
Q. But if a man is in the performance of his duty under the rules, it is his duty to be on top of the train in descending grades, isn't that true?
A. On some grades; they specify three grades.
Q. The rule is general, isn't it?
A. It is a general rule that they are supposed to be out on all grades.
Q. Now, you called for the hand brakes when you saw this train?
A. Yes, sir; I called by one long blast of the whistle.
Q. You put on the air and called for the hand brakes, too?
A. Yes, sir.
Q. You called for the hand brakes because you thought they would aid in stopping the train, didn't you?
A. No, sir; I knew they wouldn't aid me then. I called for brakes to call the attention of the train crew.
Q. So they could take care of themselves?
A. So they could jump off.
Q. In other words, when you called for the hand brakes, if a man was on top of the train he had a better chance of taking care of himself?
47 A. If I didn't call for brakes he probably wouldn't be looking out, and when I called for brakes I called his attention to the fact that something was wrong.
Q. And then he could take care of himself?
A. That is the idea.
Q. You say you saw this train about 250 yards ahead of you, didn't you, Mr. Binkley?
A. Something about fifteen car lengths.
Q. You stated on your examination on the investigation that you first saw this train about 250 yards ahead of yours, didn't you?
A. That would be about fifteen car lengths—40 feet to a car.
Q. How long is a car?
A. Forty feet.
Q. Fifteen car lengths would be about 600 feet. That would be about 200 yards.
A. Something near that.
Q. It would be between 200 and 250 yards, then?
A. Yes, sir.

Q. You said the brakeman, if he shoveled coal, did it voluntarily —didn't have to do it?

A. No, don't have to do it.

Q. He doesn't have any duties on the engine, does he, in the running of the train?

A. No, sir.

Q. Just goes there because he likes to go there to ride?

A. Goes there to ride; that is where they all ride.

Q. The rear brakeman does not ride on the engine, does he?

A. No, he rides in the caboose.

Q. Now, suppose an engine is going down grade, Mr. Binkley, and it becomes necessary to stop the train quickly, and the engineer applies the air, and for some reason it doesn't work right, what does the engineer do then?

A. Well, I will tell you what I would do?

Q. Well?

A. I would put on and reverse her and call for brakes.

Q. Call for brakes?

A. Call for brakes.

Q. If for any reason your air does not work satisfactory, you call for the hand brakes, do you not?

A. Yes, sir.

Q. Now, isn't that one reason why brakemen are on top of the cars, and ought to be on top of the cars, in those conditions?

A. Yes, sir; that is the only reason.

48 Q. So they can respond?

A. That is the only reason.

Q. They also, in going down grades, are supposed to watch out for the cars in their part of the train, are they not, to see if anything goes wrong with them?

A. Yes, sir.

Q. And to signal the engineer, in case they see anything wrong?

A. Yes, sir.

Q. You say, I believe, that there are either three or four cars on 115 that were wrecked?

A. Yes, sir.

Q. You don't know whether it was two or three?

A. It was either three or four; I don't know which; it was either three or four.

Q. I mean either three or four?

A. Yes.

Q. How fast was your train running when you first saw this train?

A. About twenty-five miles an hour.

Q. And you slowed down to about three or four miles an hour before you collided?

A. I supposed I was going about that fast when I hit; yes, sir.

Q. You were going up grade?

A. Yes, sir.

Q. Couldn't you have stopped your train in two hundred feet?

A. Oh, yes, I could have stopped it in less than 200 feet, and did do it before they hit; I hadn't gone 200 feet before they hit.

Q. Going up grade?
A. Yes, sir.

Redirect examination.

By Mr. LEECH, for plaintiff:

Q. How long had young Lewis been a brakeman; in the railroad service as a brakeman?
A. I think only about six weeks; something like that.

And further this deponent saith not.
(Signature waived.)

Sworn to before me when given, this October 29, 1910.
[SEAL.] S. F. FORD,
Notary Public.

Mr. LEECH: If the court please, the deposition of Dr. Cunningham, I suppose, would fall under the exception and the ruling on the mental and physical suffering.

The COURT: Yes, sir; you may show that it was offered.

49 Mr. LEECH: Yes, sir, and that it was excluded by the court upon the ground that it was incompetent upon that subject. And to which action of the court the plaintiff excepts.

The deposition of Dr. R. D. Cunningham, so excluded by the court, is as follows, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee, Thursday, October 27, 1910.

C. W. GARRETT, Adm'r of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The Deposition of Dr. R. D. CUNNINGHAM, Taken at Office of S. F. Ford, Stenographer and Notary Public, Vanderbilt Building, Nashville, Tennessee, by Consent, in the Above-styled Cause, to be Read as Evidence in Behalf of Plaintiff.

Caption, certificate and all formalities waived.

Said witness, Dr. R. D. CUNNINGHAM, having first been duly sworn, deposed as follows:

Direct examination:

By Mr. H. N. LEECH, for plaintiff:

Q. Doctor, how long have you been a physician, and where do you practice medicine?
A. I have been practicing ever since 18—. I commenced in 1891, and then I have been practicing since 1894 in Big Sandy, Benton

ounty—now wait, I have been practicing in Benton County and ear Big Sandy since 1904; in Big Sandy four years.

Q. Are you a graduate of a regular medical university?

A. Vanderbilt University, of Nashville.

Q. Were you called to see T. W. Lewis, Jr., when he was hurt in he collision near Big Sandy in September, 1909, a year ago last eptember?

A. Yes, sir.

Q. How long did you get there after the collision—how long was t after the collision before you got to where he was?

A. I don't know.

Q. What time did you get there?

A. I got there about 2:00 or 2:25.

Q. In the morning?

A. In the morning; yes, sir.

Q. Just state the condition you found him in, how he was lying and all about it?

50 A. I found him lying with his—well, his body was on his face, but I don't know whether he was that way when he was nurt. When I found him they had dug a hole way under the boiler for him to get out. They found his feet fastened and they couldn't get him out, and he would lie on his right side and turn over on his face, and turn back on his back.

Q. How much of his body had extended under the boiler?

A. You mean, was pressed under the boiler?

Q. No, extended under it? I understood you to say they dug some out

A. Now, Colonel, his feet was pinioned about the center of the boiler, and as big as those boilers are, the sides of the boiler will come clean out over a man's shoulders and never touch him, the boiler is so large, you understand; but it was from his knees to his feet, was what was fastened. When I got to him they had dug out and let him down some. I don't know when it was first done, how much, but it was from his knees down.

Q. State whether his hip—if so, what hip—was crushed?

A. His left hip was crushed.

Q. What was on that when you got there?

A. Wasn't anything on it.

Q. Well, had anything been taken from it?

A. Part of the cab had been taken from under it.

Q. You mean, part of the engine cab?

A. Part of the engine cab had been taken from under it.

Q. From off the hip or body?

A. Under the hip.

Q. Was that what crushed it?

A. I think so, the boiler coming down, and it had been dug and let down; he was on the engine cab, side of the cab, and the boiler, when I got him, was——

Q. (Interrupting.) State whether his legs, as well as his body, was broken?

A. The left leg was broken in the middle third of the lower leg.

If the right leg was broken anywhere, I didn't find out. I didn't give a very thorough examination because he died when I started to examine him.

Q. That is the reason you can't state anything more about it?

A. That is the reason I can't state anything more about it, because I didn't examine the dead man.

Q. Was his legs, or feet, baked from heat?

A. I don't know whether they were baked from heat or not. The lower part of the right leg was cooked from the lower third
51 down, cooked from steam or something else—I don't know whether it was from heat or steam or water. There was no steam that I seen.

Q. His body was cooked, as you have stated?

A. No, sir, not his body; his limb. His body was as perfect, apparently, as mine.

Q. You mean by his limbs below his hips, do you?

A. His lower extremities; yes, sir.

Q. Was he dead before they got him out?

A. No, sir.

Q. Immediately after?

A. It was something, I would say, from five to fifteen minutes.

Q. After he was got out?

A. Yes, sir.

Q. You say you got there about 2:00 or 2:25 in the morning; how long after that was it before his body was entirely gotten out?

A. I don't know, Colonel; I would have to guess at that.

Q. Well, guess at it?

A. His body was got out somewhere between 3:30 and 4:00 o'clock.

Cross-examination.

By Mr. SAVAGE, for defendant:

Q. How far from Big Sandy did the accident occur, doctor?

A. I think it was about two miles.

Q. You were called from your home in Big Sandy to see this man?

A. Yes, sir.

Q. When you reached him it was some time after the accident occurred, and you found that they had been digging around the body with a view to getting him out or relieving him?

A. Yes, sir.

Q. And when you got there his legs below the knees seemed to be fastened under something like the center of the boiler, and the balance of his legs, limbs and body were not under any pressure?

A. No pinion about them at all.

Q. He seemed to be in no pain when you got there, I believe?

A. Didn't seem to be in any, Colonel. He told me that he wasn't in any pain at all.

Q. I will ask you if he didn't tell you, until up to the time
52 they got him out from under the boiler, that he felt no pain, and he believed if they could get him out that he could walk and get about all right?

A. He told me, he says, "Doctor"—he kept telling the men there—they were digging to put a jack under the head of the boiler to jack it up—he kept saying, "Man, hurry up there, I am all right." I says, "Do you feel any suffering?" He says, "Doctor, I am all right; if they will raise that a little bit I will get out all right."

Q. So he wasn't conscious of any pain at all?

A. Didn't seem to be at all.

Q. I will ask you if he was in his right mind, at himself?

A. Apparently; yes, sir. When I walked up, I says, "Who is hurt? What man is that? He turned up and he says, "Doctor, why is that you? It is Tom Lewis, Major Tom Lewis' son, you know me." I says, "Yes, Tom, I know you, and I am sorry to see you." I says, "Are you suffering any at all?" He says, "Not a bit; not a bit, if they will raise that boiler. I found his heart weak, and got him a stimulant.

Q. You had known him for some years?

A. Yes, ever since he was a little boy. But, understand, I had not had any intimacy with him since he was a child. I had seen him three or four or a half-dozen times since he went to braking.

Q. Were you there when they finally got him from under the boiler?

A. Yes, sir; I helped take him from under the boiler.

Q. You think he lived from five to fifteen minutes after being taken out?

A. Something about that, I don't think it could have been over that.

Q. During that time was he in any pain?

A. I don't think so.

Q. Did he complain of suffering or pain?

A. Now, I asked him one time, I says, "Tom"—I commenced as quick as they laid him down; I helped carry him out on a cushion and called for a second cushion as we carried him out, and we put one on top of the other, and I had a pair of scissors in my hands and I commenced cutting off this leg here of the overalls on the leg. I says, "Does that hurt you?" and I commenced raising the leg up. He says, "Not a bit." He was very feeble. He made another remark. I didn't understand what it was, and I ripped that open and leaned over his face, and I says, "Tom, what did you say?" He says, "Good-bye, boys, I can't stay with you," and laid his
53 right hand up right across his breast, and made one long breath and never breathed any more.

Q. So that he seemed to be in no pain or suffering during the whole time?

A. He didn't realize any pain, Mr. Savage, because the lower extremities were dead, not sensitive to feeling.

Q. Before he was taken out he seemed to be of the opinion, if he could be taken out, he would be all right and could go.

A. That is what he said.

Redirect examination.

By Mr. LEECH, for plaintiff:

Q. When he said he thought he would be all right if he could get out, you did not tell him he would not?

A. I did not, Colonel, because I had it on my tongue a time or two to tell him, because I knew that Tom was a pretty wicked boy. I thought I would tell him once, "It will do you no good," but I didn't want to tell him. There was one time I think he realized that he was dying, because he raised up and says, "Doctor, give me some water, please," and I gave him some water, and he turned off and says, "Oh, Lord, have mercy on my soul," put his face in his hands, cried a little bit, and turned back to me and says, "Doctor, I am all right, nowhere hurts me." And his countenance changed considerably at the time.

Q. That was after he got out?

A. No, sir, no, sir; he never spoke any words after he came up, only when I asked him if it hurt him when I raised that leg up, and he said, "No," and then he said something when I leaned over him I didn't understand, and I says, "What did you say?" He says, "Good-bye, boys, I can't stay with you," and laid his hand on his breast, but the hand didn't stay there when he breathed his last. I examined his hip without taking off his hand.

Q. The hip was badly crushed, was it?

A. It was just simply crushed.

Q. And he was burned before you got there?

A. Oh, yes.

Recross-examination.

By Mr. SAVAGE, for defendant:

Q. Doctor, you spoke in your examination in chief about getting your scissors and cutting off his leg; you meant the leg of his overall?

54 A. I said the leg of his overall, Colonel; I said the leg of his overall.

And further this deponent saith not.

(Signature waived.)

Sworn to before me when given, this October 27, 1910.

[SEAL.] S. T. FORD,
Notary Public.

The plaintiff then read the depositions of L. E. Holley and W. C. Clark as follows, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee, Friday, October 28, 1910.

C. W. GARRETT, Adm'r of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The Deposition of L. E. Holley and W. C. Clark, Taken at the Office of S. T. Ford, Notary Public and Stenographer, Vanderbilt Building, Nashville, Tennessee, on Friday, October 28, 1910, *by Consent, in the Above-styled Cause, to be Read as Evidence in Behalf of the Plaintiff.*

Caption, certificate and all formalities waived.

Said witness, L. E. HOLLEY, having been first duly sworn, deposed as follows:

Direct examination.

By Mr. LEECH, for plaintiff:

Q. What is your age, residence and business?
A. My age is 37. My residence is Cumberland City. My business is the mercantile business—general merchandise.
Q. Did you know T. W. Lewis, Jr., who was killed in a collision near Big Sandy in September of last year?
A. I did.
Q. How long had you known him?
A. Oh, I had known him all of his life, or for twenty-one years. I have been at Cumberland City twenty-one years, and I have known him ever since I have been there.
Q. How far did he live from Cumberland City?
A. About three miles, or three and a half.
Q. Until he went on the railroad, with whom did he live?
A. Lived with his father.
Q. His father carries on a large farm, does he?
A. Yes, sir.
Q. As to physical make-up, vigor of health, what kind of a man was young Lewis?
A. I regarded him as in perfect health—looked to be.
55 Q. About what was his size?
A. Why, he looked to be a man that would weigh 180 or 200 pounds. I never seen him weighed. He was large of stature, though.
Q. Large in stature?
A. Yes, sir.
Q. State whether he was an active, vigorous, energetic young man?
A. I regarded him as a very active, go-ahead kind of fellow.

Q. State whether he was a capable man in what he undertook to do in business?

A. Well, I regarded him as a capable man in business.

Q. State whether that was his reputation in the community in which he lived or not?

A. What is that?

Q. State whether that was his reputation in the community in which he lived or not?

A. I think so; I heard no complaint against him, never.

Q. State whether you regarded him as more than an ordinary man in the way of capacity for his age and in doing whatever he undertook to do?

A. Well, I regarded him physically above an ordinary man; and he was a pushing fellow; he was a go-ahead fellow; whatever he started to do, he tried to do it—pushed it through.

Q. State whether he was a young man of good education or not?

A. Well, I don't know, sir, so much about his education. He was competent to attend to anything I had seen him try to attend to.

Q. Until he went on the railroad what had he been doing?

A. Well, he worked at home on the farm with his father most of the time.

Q. What was his character for honesty and integrity?

A. I considered it good.

Q. State whether he was regarded as a very promising young man in the community in which he lived?

A. I regarded him as a man that had a good future ahead of him. He was a good physical man and a man of fair intellect—a pushing young fellow. I regarded him as having a good future.

Q. He had been in the railroad work quite a little while before he died, had he?

A. I don't remember just how long.

56 Cross-examination.

By Mr. SAVAGE, for defendant:

Q. You say he worked for his father on the farm most of the time; what do you mean by that? Did he work elsewhere at any time?

A. I couldn't speak of only one time; he worked for me one time on the river, in the log business.

Q. When was that?

A. I am not sure, but I think it was in the fall of 1908.

Q. How long did he work for you then?

A. He worked through December and a part of January for me.

Q. What character of work. What did he do?

A. He had charge of getting out some timber I had bought at Bear Spring. There come a rise in the river and tore it all to pieces, and I sent him down there to see after getting it out for me. He was an experienced man, and I sent him down there to look after rafting it and getting it out for me.

Q. And he worked two or three months for you?

A. I don't remember just how long; something like that, though.
Q. What did you pay him?
A. I paid him $1.50 a day and his expenses—board.
Q. Except that, you know of no other work he ever did except with his father on the farm?
A. No, sir, I do not, until he commenced railroading.
Q. And you spoke of his father being a large farmer; he owns a large body of land, does he, in that neighborhood?
A. Yes, sir.
Q. Cumberland River land, bottom, is it?
A. Yes, sir.
Q. How many children has Major Lewis?
A. I can't recall; don't know just how many.
Q. Is there another son?
A. One other; yes, sir.
Q. Younger or older than this one?
A. Younger than this one.
Q. Why did Tom quit the farm and go on the railroad, if you know?
A. I do not, only he had an anxiety to railroad.
Q. Did he ever talk to you, tell you why he was going to work for the railroad?
A. No, sir, he did not.
Q. At any rate, his father had plenty for him to do at home if he stayed there—if he had wanted to stay there?
A. Well, he had plenty of work there; yes, sir.
Q. Large farm?
A. Yes, sir.
Q. And he employs a great many men, does he not?
A. I think so.
Q. Raises large crops of corn and other products?
A. Yes, sir.
Q. Do you know what arrangement he had with his father about his work on the farm, as to how much he received for his work?
A. I do not; no sir.
Q. Was he paid wages, or did he get a part of the crop?
A. I don't know about that.
Q. Did he own any stock—I mean, horses, mules, or anything that kind?
A. I couldn't say.
Q. When he worked on the farm did he make a hand—I mean the field, plowing, and work of that kind?
A. I don't know about that. I think he just went right ahead; went right ahead with the work.
Q. I mean, he worked as a hand?
A. Oh, yes; yes, sir; he worked and managed around.
Q. His father, however, manages the business himself, does he not?
A. I don't know about that?
Q. Do you know the age of his father?
A. No, sir, I do not.

Redirect examination.

By Mr. LEECH:

Q. The time you had him to look after some timber, that was a small matter that you asked him to look after, was it?

A. Yes, sir; we telephoned up to him to get him to go down there and look after it. Being busy in the store, I couldn't go myself.

Q. Major Lewis, his father, is something near seventy, you would think, would you not?

A. Yes, sir; I would judge something about that.

And further this deponent saith not.

(Signature waived.)

Sworn to before me when given, this October 28, 1910.

[SEAL.] S. T. FORD,
Notary Public.

Said witness, W. C. CLARK, having been first duly sworn, deposed as follows:

58 Direct examination.

By Mr. LEECH, for plaintiff:

Q. What is your age, residence and occupation?

A. I am 42; reside about four miles from Cumberland City, three and a half to four miles from Cumberland City, and am a farmer and also machinist and mill man.

Q. Did you know young Tom Lewis prior to the time he was killed in a collision?

A. Yes, sir.

Q. How long did you know him?

A. Why, personally for ten years; I had been knowing him, seeing him before that pretty well all his life, you might say.

Q. How close did you live to him?

A. About a quarter of a mile—something near a quarter of a mile.

Q. Prior to his going in the service of the railroad what kind of business did he follow?

A. Why, worked on the farm, managed the farm, and the mill—anything that come to hand on the place.

Q. Was he living on his father's place with his father?

A. Yes, sir, living with his father.

Q. You say he worked as a hand and managed the place?

A. Managed anything that come to hand, anything, all around.

Q. State whether he was an active, vigorous, industrious young man or otherwise?

A. He was industrious, vigorous, stout, worked at everything he undertook, and went at it with a vim.

Q. State whether he was a man of fine health or not?

A. I considered him so, yes, sir—healthy, stout, ablebodied young man.

Q. Did you regard him as a very capable young man in anything he went into?

A. Yes, sir.

Q. What was his character as a man?

A. Why, I considered it good, as one of the best.

Q. State whether he was a young man of reputation for integrity and general good character?

A. He was; yes, sir.

Q. His father had a very large farm, did he?

A. Yes, sir; owns a large farm on the river.

Q. State whether young Lewis was regarded as a very promising young man in that community in which he lived?

A. Why, he was yes, sir.

59 Cross-examination.

By Mr. SAVAGE, for defendant:

Q. You say his father had a large farm; how large is it?

A. Why, something, I guess, fourteen, probably fourteen or fifteen hundred acres; something like that.

Q. Much of it is very fine, valuable river bottom land?

A. Why, something near 400 acres, I guess; 350 or 400 acres—in bottom.

Q. What kind of crops does he raise? Corn?

A. Corn, tobacco, wheat, hay.

Q. Did young Tom Lewis work in the crops as a hand, plow and do other work?

A. Sometimes he did plow, yes, sir, and when he did he was with the other hands and worked and managed the business a good deal of the time.

Q. His father manages his place, does he not; he is the superintendent?

A. Why, he does now, but at times he wasn't able to do it himself; Tom always went ahead just the same.

Q. What wages did his father pay him?

A. Why, he just worked and lived as one of the family, I think.

Q. Did he get no pay for it at all?

A. Why, he could get anything mostly he wanted, I guess; it was just as a family; worked there and lived there at home.

Q. I understand, but did he have no interest in the crops themselves and got no pay?

A. He had most of the time a crop himself that he made.

Q. A crop of his own?

A. A crop of his own; yes, sir.

Q. Did he pay his father rent for the land?

A. Why, I suppose that he did; I won't say for sure, though, but when he worked his crop, he worked through the other crop, all through, together, the whole thing through together.

Q. But he usually had a crop of his own?

A. Did most of the time; yes, sir.

Q. Do you know how much he made?
A. No, I do not; I couldn't say for certain as to that.
Q. Do you know what sized crops he raised?
A. Why, he had anywhere from 20 to 30 acres in corn, and sometimes a tobacco crop; sometimes he didn't raise any tobacco at all.

60 Q. Did he do any work except farm work while you knew him?
A. Yes, sir; he worked at the mill; his father owns a sawmill and grist mill; he worked at that a good deal of the time.
Q. What did he do there?
A. Anything that come to hand; generally fired the engine, ran the engine when we were sawing or grinding, either one; could grind and run the grist mill.
Q. What wages did he get?
A. I couldn't tell you that.
Q. You don't know what his father paid him?
A. No, sir. The sawing, I done the sawing myself if I was able, but if I was sick or out for anything Tom took my place and went on with the mill just the same.
Q. Well, did he do any other work off the farm except as you have stated?
A. Which, you mean outside of the farm work?
Q. Yes?
A. Yes, sir; he sometimes worked out.
Q. Where?
A. Worked on the river a good deal; that is, part of the time in the fall, winter and spring.
Q. Who did he work for?
A. He worked for Mr. Holley some. I think he worked for J. G. Williams some.
Q. J. G. Williams, the lumber man?
A. Yes, sir.
Q. Well, who else did he work for?
A. I don't remember now anybody else in particular.
Q. How long did he work for Williams, if you know?
A. I don't know; I couldn't say.
Q. Well, did he work for Williams parts of different years or winters, say, or different years?
A. I don't know that he ever worked only one winter, some one winter.
Q. Do you know what he was paid, what he made in that work?
A. No, sir; I don't know what he got for his work.
Q. Well, any other work do you recall that he did except the mill and farm and this river work?
A. Why, he worked for Mr. Ed. Thomas and Byers some, run an engine for them two seasons, run a threshing machine.
Q. Do you know what he made at that?
A. He got a dollar a day and his expenses straight all the time.

61 Q. What did he do with his money?
A. Why, I suppose he took care of his money pretty well;

he owned some stock and stuff there on the farm; had some good horses.

Q. His father didn't need it; he was a man in fine circumstances?

A. How is that?

Q. I say, his father didn't need it; he was a man in fine circumstances?

A. Didn't need his money?

Q. Yes?

A. No, sir.

Q. Why did young Tom quit the farm to go railroading, if you know?

A. Why, I couldn't say, unless it was he just wanted to be out on the road, I should think.

Q. Did he tell you why?

A. Well, I should judge from everything it was just more for the pleasure there was in it, as he thought, than anything else. He had a natural craving for machinery of every kind, and wanted to run machinery, and he was a good machinist.

Q. Did he ever tell you why he wanted to quit the farm and go to railroading?

A. No, sir; I never saw him after he left home and went on the road until he was killed.

was it?

Redirect examination.

By Mr. LEECH, for plaintiff:

Q. You say he had a kind of genius for machinery?

A. Yes, sir; natural, you might say natural. It come natural to him. He would take up machine work and learn in a short time. It come natural for him to do it. He had rather do that than anything.

And further this deponent saith not.

(Signature waived.)

Sworn to before me when given, this October 28, 1910.

[SEAL.] S. T. FORD,
Notary Public.

Mr. KEEBLE: Now, Your Honor, permit me just a moment: I do not like to annoy you on the points that were threshed out before, but I remember that we did have an objection to this class of evidence upon the two propositions, and I want to make the objection now, this objection, as to the earning capacity or earnings of this young man, as being irrelevant and incompetent to
62 any issue in this case, for two reasons. As I understand the declaration, this is really a declaration that proceeds upon the idea that it was the cause of action of the deceased himself, and is based upon the pain and suffering and the general conditions of the accident, and is not a declaration shaped upon the theory of the second right of action given under the statute, that is to say, a declaration for the beneficiary; consequently, any evidence in this

record as to the earning capacity or character of this young man would be incompetent from our point of view.

The second point of view, if I am mistaken about the first of defendant's propositions, and this is a suit for the benefit of the next of kin, then it becomes necessary for the declaration to allege some pecuniary loss on the part of the plaintiff in order to lay ground for evidence of that character.

The COURT: I find that this declaration does not specifically aver that this suit is brought for the use of the beneficiary, the father and mother, neither is there any specific averment as to damages to the father and mother resulting from the death of the son. I have serious doubt whether, under that form of declaration, or whether in the present shape of the declaration, whether evidence such as that objected to which might throw light upon the question of damages to the beneficiary, is competent, but I haven't the opportunity now to examine the authorities on that question of pleading and to decide it definitely, without the investigation I would like to make. I find that plaintiff's counsel has an elaborate brief which has been submitted, which goes fully into his theory of the case and which has evidently been prepared with a great deal of thought and thoroughness; so that, I do not want to definitely rule on the question in a manner which would be prejudicial to the plaintiff, if he is entitled to recover, otherwise than as it should be, and I have concluded to overrule the objection to the evidence for the present and to say that I will allow the plaintiff, if he so elects, to amend the declaration on its face so as to specifically aver that the suit is brought for the benefit of the father and mother and their use, and also to specifically aver damages resulting to them from the death. If the plaintiff elects to do that, to make that amendment, then the exception to this evidence will be definitely overruled. If the plaintiff does not elect to do so, before the conclusion of the testimony in the case, then the defendant may renew its motion to exclude this evidence and I will then rule on it finally.

63 Mr. LEECH: So far as amending the declaration so as to allege it is for the benefit of the father and mother, under the statute, I am perfectly willing to do that. On the other question I want some time to think about that.

The COURT: You may have until the close of the evidence to determine what you wish to do—until the close of all the evidence.

Mr. LEECH: Then Your Honor will take up the question and hear argument upon it?

The COURT: I will hear argument before I finally rule, but if the amendment is made in accordance with the terms given, then the exception will be overruled.

Mr. KEEBLE: We shall, of course, if that phase should come up, insist that that is a new suit.

The COURT: Well, the court will overrule that and will treat it as a more complete statement of the cause of action stated in the declaration.

You may proceed with the evidence in the case.

T. W. LEWIS, sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. LEECH, for plaintiff:

Q. Major Lewis, where do you live?

A. I live twenty miles from Clarksville, right on the line; my residence is just in Stewart County, and the biggest portion of my farm is in Montgomery County, right on the Cumberland River.

Q. Your son, T. W. Lewis, was killed on the 26th day of September, 1909, in a collision, was he?

A. Yes, sir.

Q. What was his age at that time?

A. He lacked six days of being twenty-four years old.

Q. How long had he been in railroad work?

A. Not over a few weeks, or a month probably, something like that.

Q. Tell the jury whether or not he was there permanently or temporarily, or why he went into the railroad service?

A. Well, I can't tell you why he went into it, but he just went there temporarily. He wasn't doing much on the farm. He just went out, I suppose, because he loved machinery mighty good.

Q. Was his purpose to come back home and be with you?

64 A. Yes, he would have been back home in two weeks if he hadn't been killed, I am satisfied of it.

Objection by defendant.

Q. Was that your understanding when he left home?

The COURT: What is the question objected to?

Mr. KEEBLE: He says he was satisfied he would come back in two weeks. We think that is entirely too vague and indefinite, as to what the young man was going to do.

The COURT: I think the objection is well taken, just as to the witness' statement he was satisfied he would come back. He may state the facts upon which he bases that.

Mr. LEECH:

Q. When he left home, state if he said whether he would be back or not or be gone only a short time?

A. I knew he would come back, but I couldn't tell that. I wouldn't swear a lie for the whole business. I don't know. He told me he would be back, that was all, that was enough. He didn't expect to stay but a little while.

The COURT: The rest of the witness' answer, that he knows, is excluded. But the statement that his son told him before he left that he would come back is competent.

Mr. LEECH:

Q. The court admits your statement that he told you he would be back.

A. Yes, he would be back; I know he would have been back.

Q. Tell the jury what kind of a man he was physically, morally and in point of education and fitness for work of any kind?

A. I don't know as I could tell it all. He was about six feet four inches tall; I think he weighed 185 or 190 pounds. Physically he was the best man in twenty miles of where he lived. He was an able man. As to education, he was well educated. I kept a governess there for four years and he went to the academy at Cumberland City for a good while, and after that I sent him two years to Bell Buckle, and he might have stayed longer in Bell Buckle and graduated, but he took fever and came home. He had typhoid fever when he got home. And as far as business qualifications, I don't think there was anybody any better. At least, he was a great help to me upon my farm. I am getting old and getting very feeble, I am not able to attend——

Mr. KEEBLE: We object to that.

The COURT: The objection is overruled.

Exceptions for defendant.

Mr. LEECH:

65 Q. Go ahead, Major; the court said go ahead.

A. And he was a great help to me, more so than my other younger boy; he is just twenty-one, he is the baby, the youngest one.

Q. Major, state whether he lived there as a member of your family, or whether you paid him any wages or charged him any rents?

A. I gave him money when he wanted it. He was there and when he wanted money he would get it. Well, he would go and do things for me and he would come to me and say, Old Man, I want so much, and he always got it.

Q. State to the jury whether he was your manager of your farm?

A. Yes, yes. I couldn't attend to all of it. I relied upon Tom.

Q. You relied upon Tom?

A. Yes, sir.

Q. State to the jury what kind of a farm you have there and what kind of crops you make every year in your business?

A. Well, I have got a pretty—well, I don't know, bigger than a heap, bigger than my neighbors, I am about the biggest farmer there. I have got 1,880 acres. There is 375 acres bottom land. I raise a heap of corn. Mr. Rhea can tell you, I have shipped him corn. I have been shipping him for forty-eight years, his father and him together. I raise tobacco, wheat, hay and stock, and so on.

Q. Tell the jury whether or not Tom was really your general manager of your business?

A. Tom was my dependence.

Q. He was your dependence?

A. Yes, sir.

Q. How old are you; give your exact age?

A. I will be 71 years old the 10th day of next September.

Q. How old is Mrs. Lewis, his mother?

A. She is 63 the 12th day of last March. Sixty-two when I was here before.

Q. Tom had never been married?
A. No; oh, no.
Q. He just lived there as one of the family?
A. Yes, sir.
Q. His mother was 62 when she was here before?
A. Yes, that was May.
Q. State whether Tom had an aptitude for all kinds of machinery or not?
A. Yes, he was a great hand for machinery. I have seen him do things there with my traction engine that I really thought
66 strange to see him do it. I was old-fogy; I would take four cattle to do a thing. Tom says, Papa, if you will get away and don't say nothing, I will take your engine, and he would haul it.
Q. Was he a man of fine health?
A. Fine health.
Q. State whether he was a man of industry and energy or not?
A. Yes, sir.

Cross-examination.

By Mr. SAVAGE, for defendant:

Q. Major, when did he leave home, or when did your son leave home and go on the railroad?
A. Well, I don't think it was over a month. I couldn't tell you exactly, Mr. Savage, before he was killed.
Q. Well, he was killed in September, was he?
A. Yes, the 26th day, I think.
Q. So that he left home some time in August?
A. Yes; the farm crops were laid by.
Q. You raise tobacco, don't you?
A. Yes. I don't raise it; my share hands raise all the tobacco I raise.
Q. Your tobacco, wasn't it?
A. Yes, sir.
Q. How much crop did you have in for yourself that year?
A. I couldn't tell. Two or three hundred acres of corn.
Q. Two or three hundred acres of corn?
A. Yes, somewhere along there; I can't tell you exactly.
Q. You manage your farm; you have always managed your farm?
A. I am head of the concern.
Q. And your sons and your hands all obey you and what you say?
A. Yes.
Q. You are the boss?
A. Yes.
Q. Well, when he left home to go on the railroad, he didn't tell you how long he was going to be gone, did he?
A. No; he said he wouldn't be gone long.
Q. He didn't say how long?
A. Oh, he didn't know how long, of course not.
Q. And there was no time fixed when he was coming back?

A. There was no day set or anything of that sort.

Q. There was no month fixed, was there?

67 A. No, I don't know that there was.

Q. He didn't tell you he was coming home to help you gather corn?

A. Yes, he said he would be back to put up the corn; to gather the corn.

Q. Did he tell you that?

A. Yes. He had corn of his own.

Q. How much corn did he have?

A. I don't know, twenty or thirty or forty acres; I couldn't tell you exactly.

Q. Twenty or thirty or forty acres? Did he attend to all that himself?

A. He took my hands and attended to it just like the rest.

Q. The year before that, did he have in a crop?

A. I don't recollect whether he did or not, Mr. Savage.

Q. Did he ever have a crop before that year of his own?

A. I don't remember. I believe he did.

Q. You believe he did?

A. I gave him a crop whenever he wanted it. Take so much corn. He had stock of his own and he was worth—well, he had a right smart of stock.

Q. What did he do with his crops?

A. Why, of course I gathered that.

Q. I mean, before that, the crops he raised before?

A. He sold them and put the money in his pocket.

Q. Sold them and put the money in his pocket?

A. Yes.

Q. About how much did you give him every year, Major?

A. I couldn't tell you that, Mr. Savage.

Q. About how much?

A. I never had no stipulated price with him. Whenever he wanted any money he came to me and got it.

Q. You paid him more than any other hand on the place?

A. Certainly I did; of course I did.

Q. You didn't limit him to the wages of a hand?

A. No, he got it when he needed it.

Q. Got the money whenever he needed it?

A. Yes, if I seen he needed it I gave it to him.

Q. You dressed him well and educated him and gave him money whenever he needed it?

A. All my children; I educated nearly all my children. Tom didn't graduate because he took the fever. He was two years at Bell Buckle and took the fever and never went back.

Q. Do you know whether he worked on the railroad more

68 than a month; do you know whether he collected any wages of the railroad?

A. I don't think he collected any. Mr. Garrett, his administrator, collected—I don't know how much he collected. I know Mr. Garrett said the railroad had paid it.

Q. I believe you said your son was 24 years old when he was killed?
A. He lacked six days of it. He would have been 24 the second day of October if he had lived.

Further this deponent said not.

Mr. LEECH: By agreement we will read the testimony of Mr. Davis, taken at the former trial, as his deposition. (Reads deposition.)

W. B. DAVIS, witness for plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. LEECH:

Q. Mr. Davis, what is your business?
A. Life insurance.
Q. You are posted on the tables as to the expectancy of life?
A. Yes, sir.
Q. What would be the expectancy of a young man 24 years of age under the approved tables of mortality?
A. Thirty-nine and one-half years.

Objection by defendant.
Objection overruled.
Exception for defendant.

Q. Did you give it?
A. Thirty-nine and one-half years.

Cross-examination.

By Mr. SAVAGE, for defendant:

Q. Mr. Davis, a man of 70, what would be the expectancy of him?

Objection by plaintiff.
Objection overruled.
Exception by plaintiff.

Q. A man of 70, what is the expectancy?
A. I would have to probably look at the table, Judge. I think it is in the neighborhood of eight years, though.
Q. A woman of 62?
A. A woman of 62, the expectancy is, if I remember correctly, about five years.
Q. About five years?
A. Yes, sir.

Further this deponent saith not.
Plaintiff here rested his case in chief.
Mr. KEEBLE for defendant: I want to make my motion.
The COURT: You may make your motion.
Mr. KEEBLE: I do not care to state the grounds if I may make that later.

The COURT: I have heard this case before and I overrule your motion.

Mr. KEEBLE: I may state later my grounds?

The COURT: You may put in the record the grounds of your motion.

The defendant thereupon introduced the following evidence:

Defendant's Proof.

A. B. SCATES, sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. SAVAGE:

Q. Your name is A. B. Scates?
A. A. B. Scates.
Q. You live in Paris, Tennessee, Mr. Scates?
A. Yes, sir.
Q. Are you connected with the Louisville & Nashville Railroad Company?
A. Yes, sir.
Q. In what capacity?
A. Trainmaster.
Q. How long have you been trainmaster?
A. Nine years.
Q. How long have you been a railroad man?
A. Twenty-nine years.
Q. In what capacities?
A. Brakeman, conductor, freight and passenger conductor.
Q. Brakeman on freight trains?
A. Yes, sir.
Q. How long were you brakeman?
A. Four years.
Q. You were then freight conductor?
A. About eight years.
Q. And passenger conductor?
A. About — years.
Q. And you have been master of trains on the Memphis Division about nine years?
A. A little over nine years, right around nine years; yes, sir.

Q. I hand you a book, Mr. Scates, and will ask you if it
70 is a book of rules of the operating department of the Louisville & Nashville Railroad?

A. Yes, sir.
Q. On pages 128 and 129 is Rule 516. I will get you to read that rule?
A. (Reading:) "The proper place for a freight train conductor while his train is in motion is in the cupola of the caboose, if it has one. If the caboose should not be provided with a cupola, he must maintain such other position either on top or inside as will give him full view of his train and enable him to see that his brakemen prop-

erly perform their duties and to know that the flagman goes out promptly when necessary to flag. He must also keep a sharp outlook when on curves. He should not ride on the engine except in case of emergency. When trains are descending grades or approaching and passing through station, flagmen and brakemen must be at their post on top of the train. Brakemen, when riding on the engine, must obey the enginemen's instructions."

Q. How many brakemen on freight trains at that time at the time of this accident?

A. Two on through freight trains.

Q. Was that a through freight train?

A. Yes, sir.

Q. The crew consisted then of the fireman, engineer, conductor and two brakemen?

A. Yes, sir.

Q. This young man Lewis was a brakeman, was he?

A. Yes, sir.

Q. Front brakeman?

A. Front brakeman; yes, sir.

Q. Where did this accident occur?

A. About two miles north of Big Sandy.

Q. The train was going south?

A. The train was going south; his train was, yes, sir.

Q. What character of track, level, up grade or down grade?

A. Descending grade.

Q. Down grade, descending grade?

A. Down grade.

Q. Well, was it a pretty steep grade, Mr. Scates?

A. Yes, sir; it was a heavy grade.

Q. Was there a station near by, south; were they approaching a station?

A. South was something like two miles, down to Big Sandy, but it was grade all the way.

71 Q. A grade all the way, all the way down to Big Sandy?

A. All the way down to Big Sandy.

Q. Is Big Sandy the station at which they expected to pass the other train?

A. Yes, sir; that is the station they were to pass.

Q. The collision occurred just north of Big Sandy?

A. Just north of Big Sandy.

Q. And this train was going south and they expected to pass the other train at Big Sandy?

A. Yes, sir.

Q. Mr. Scates, where is the proper position for the front brakeman while descending a grade like that, on the train, about what part of the train should he be?

A. He should be anywhere between six, eight or ten car lengths back from the engine.

Q. On top of the train?

A. On top of the train.

Q. Now, why should he be there?

A. He should be there to pass signals in case it should be necessary to apply hand brakes in the event the engineer should call for them, and to keep a lookout for the cars around curves, that their running gear is all right.

Q. Can the air brakes be applied also from the top of the cars by the brakemen?

A. Yes, sir, with the use of the Sullivan valve.

Q. But that valve is within reach or accessible to the brakemen on top of the train and in case of emergency or, if necessary, he can apply the air brake by using that valve?

A. We only use one Sullivan valve on a freight train.

The COURT: Where is that located?

A. Ordinarily in three or four or five car lengths from the caboose.

Mr. SAVAGE:

Q. Now, the front brakeman, the brakeman occupying the position that this young Lewis occupied, is the only brakeman on top of the train, is he, or supposed to be on top? The other brakeman is in the cupola of the caboose?

A. They are supposed to be, both, on the top of the train going down a grade.

Q. You have retainers, also, I believe, have you on those cars?

A. Yes, sir; we have a pressure retainer on each car.

Q. What is the retainer and what is it used for?

A. Pressure retainers are used to permit the brakeman to turn up a little handle, which causes the brake cylinder to hold fifteen pounds of air and this will enable the engineer to release his air and
72 recharge his train line without the brakes going into full release position to hold the train under control.

Q. To operate those retainers, I mean, the brakeman must be on top of the train, to operate those retainers?

A. Yes, sir.

Q. Well, is that one of the duties also of the brakeman?

A. Yes, sir.

Q. To look after the retainers an- operate them at the proper time?

A. At such times as they are instructed or the rules require.

Q. Mr. Scates, do you require the observance of this rule by the brakemen?

A. We endeavor to do so; yes, sir.

Q. Well, if they don't observe it and you learn that they do not observe it, what do you do.

A. We discipline them.

Q. Discipline them?

A. Yes, sir.

Q. They are required to observe this rule?

A. They are required to observe that rule; yes, sir.

Q. Have you any other rule than this, authorizing or permitting brakemen to ride in engines?

A. No, sir.

Q. Is there any duty for the brakemen to perform in the engine?

A. None.
Q. None at all?
A. No, sir.
Q. There is nothing in the engine or locomotive for the brakeman to do, no part of his duty is in the engine?
A. No work assigned to him on the engine at all.
Q. Then if Lewis had been at his post, he would, you say, have been back eight or ten cars?
A. Yes, sir; six or eight or ten cars, somewhere there.
Q. Assuming that there are about twenty cars in the train?
A. Yes, sir.
Q. Who are supposed to be in the engine?
A. The engineer and the fireman.
Q. When new men are taken into the service as brakemen are they given copies of the book of rules?
A. Yes, sir.
Q. Mr. Scates, you knew Lewis, the deceased?
A. Yes, sir.
Q. And did you give him a book of rules?
A. Yes, sir.
73 Q. Did you take his receipt?
A. Yes, sir.
Q. At the last term of the court you produced a receipt here, did you not?
A. I produced that receipt here in court.

Mr. SAVAGE: I don't know where that receipt is, but it is agreed that that receipt is a part of the record and was introduced at the last term of the court. I haven't seen it.

Mr. LEECH: I don't think it was produced. I think it was conceded without objection.

Mr. SAVAGE: Oh, yes, it was here. Mr. Scates produced it.

Mr. LEECH: That is all right. The stenographer may note it.

Mr. SAVAGE: That book of rules was given to this man and his receipt taken for the book of rules.

Q. Did you go to the scene of the wreck, Mr. Scates?
A. Yes, sir.
Q. About how many cars were torn up, I mean the train that Mr. Lewis was on?
A. I won't be positive, I think it was six.
Q. There were some boys stealing a ride on the train, I believe, were there not? Did you see them there?
A. They said they were; yes, sir.
Q. You saw the boys there?
A. I saw one young man there; yes, sir.

Cross-examination.

By Mr. LEECH, for plaintiff:

Q. Mr. Scates, you say that the place is for the brakeman, on descending grades, from six to eight cars back from the engine?

A. Ordinarily; yes, sir.

Q. Ordinarily, but, as a matter of fact, you have got no rule fixing that?

A. We have no rules fixing the required distance.

Q. He may be anywhere on the front part of the train descending a grade; that is a fact?

A. Yes, sir; he may be anywhere. Ordinarily he will be six or eight car lengths.

Q. You don't mean to say your rules designated how far back?

A. No, sir, I don't mean to infer that.

Q. I will ask you if the time card of the company is not in the hands of the engineers and conductors on freight trains?

74 A. Yes, sir.

Q. Please state whether on the time card at that time issued by your company the following rule existed, or instruction, rather, under the head of "Rules governing the use of pressure retaining valves. Retaining valves must be used on the following descending grades: Cherry's, Clarksville, and Tennessee Ridge. The retainers must be promptly released at the foot of the hill. Conductors must instruct brakemen before turning over the top of the grades referred to above as to number of retainers to have turned up. Conductor will consult with the engineer as to the number desired."

A. Will you give me the date of the time table? When did this accident occur?

Q. The 26th day of September, 1909.

A. That is on this present time table, dated August 21. I think it has the same instructions that was on the previous time table.

Redirect examination.

By Mr. SAVAGE, for defendant:

Q. Mr. Scates, that rule reads, about which you have been asked by Mr. Leech, reads as follows: "Retaining valves must be used on the following descending grades: Cherry's, Clarksville and Tennessee Ridge." That doesn't mean that they are not to be used on others, does it?

A. No, sir; we require them used on those three grades by freight trains.

Q. They must be used on all freight trains?

A. Yes, sir.

Q. But if necessary the brakeman on top of the train is required to use them on all grades, but they must be used on the three grades named here?

A. They must be used on the three grades. If, in the judgment of the engineer, he should think it would be best to turn up retainers, he could instruct the retainers to be turned up on any grade.

Further this deponent saith not.

H. W. HODGES, sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. SAVAGE:

Q. Where do you live, Mr. Hodges?
A. My home is in Paris.
Q. What is your business—what do you do?
75 A. Well, I have been working for the county, at Memphis.
Q. At Memphis?
A. Yes, sir.
Q. Your home is in Paris?
A. That is where my parents live; yes, sir.
Q. How old are you?
A. Nineteen.
Q. Were you on the train this young man Lewis was brakeman on when he was killed down near Big Sandy some time in September, 1909?
A. Yes, sir.
A. Who was with you?
A. A. W. Zink, my brother-in-law, thirty years old.
Q. Where were you?
A. We were about ten cars from the engine.
Q. What part of the car were you? Were you in a car or riding on what part of the car?
A. When it happened I was standing on top of a coal car.
Q. The conductor or brakeman, they didn't know you were there? You were just getting a ride into Paris, were you?
A. Yes, sir.
Q. Your brother-in-law Zink, you say, was also there, was he, at that same place?
A. Yes, sir.
Q. Do you know how many cars back of the engine were wrecked or damaged pretty badly?
A. My recollection is there was three.
Q. At any rate, were the cars back in your neighborhood wrecked or broken up?
A. No, sir.
Q. You were not injured and Zink was not injured?
A. No, sir.
Q. Your recollection is that three cars were broken up?
A. Yes, sir.
Q. Badly wrecked?
A. Yes, sir.
Q. Where is Zink?
A. He is in Memphis.
Q. He is in Memphis?
A. Yes, sir.

Cross-examination waived.
Further this deponent saith not.

J. J. RAINEY, called on behalf of the defendant, having been first duly sworn, testified as follows:

76 Direct examination.

By Mr. SAVAGE, for defendant:

Q. Mr. Rainey, have you been sworn?
A. Yes, sir.
Q. Are you in the employ of the Louisville & Nashville Railroad?
A. Yes, sir.
Q. In what capacity?
A. Conductor.
Q. How long have you been a conductor?
A. Twenty-six years.
Q. Freight train?
A. Freight and passenger both.
Q. Before you became a conductor, you were a brakeman, were you?
A. A couple of years.
Q. Freight train?
A. Yes, sir.
Q. How many brakemen have these through trains, Mr. Rainey, on the Memphis Division?
A. How many brakemen for a through train?
Q. A through train, yes; how many brakemen on them?
A. Two.
Q. Two?
A. Yes, sir.
Q. The crew consists, then, of the conductor, engineer, fireman and two brakemen?
A. Yes, sir.
Q. Where should the front brakeman on a freight train, having, say, about twenty cars, stay; where is his position, proper position? I mean at what point on the train, top of the train?
A. You mean on grades, descending grades?
Q. Yes, descending grades?
A. Well, he should be six or eight cars from the engine.
Q. Six or eight cars from the engine?
—. ——.
Q. I believe you were the conductor on the northbound train in this accident or collision?
A. Yes, sir.
Q. Mr. Johnson was the conductor of the southbound train?
A. Mr. Johnson was the conductor of the southbound train.
Q. Lewis was a brakeman on the southbound train?
A. Yes, sir.

Q. Did that accident occur on a grade, Mr. Rainey?
77 A. Yes, sir.
Q. Leading into a station?
A. Well, it wasn't leading into a station; it was about a mile and a half from the station.

Q. Well, it was a grade, wasn't it, all the way to the station?
A. All the way down?
Q. Yes, sir?
A. Yes, sir.
Q. Was there a pretty considerable grade, pretty heavy grade?
A. Yes, sir.
Q. Very heavy grade?
A. Yes, sir.
Q. Are there any duties which the front brakeman is required to perform on the engine? Has he any duties on the engine?
A. The head brakeman?
Q. Yes?
A. Not in those places; no, sir.
Q. Well, he has no duties on the engine at all?
A. None at all.
Q. Nothing for him to do?
A. No, sir.

Cross-examination.

Mr. LEECH, for the plaintiff:

Q. You stated on the former trial that a brakeman might be anywhere on the front part of the train or on the engine, didn't you?
A. No, sir.
Q. Now, you show me some rule that requires him to be six cars back, will you?
A. Well, that is the rule that we have, and I don't know as it is in the book of rules, but the head brakeman is supposed to be on top all the time going down, descending grades?
Q. He is supposed to be on top going down?
A. Yes, sir.
Q. But he is not supposed to be any particular number of cars back from the locomotive, is he?
A. It is owing to the amount of cars we have got.
Q. Sir?
A. It is owing to the amount of cars we have got.
Q. Who tells him?
A. The conductor is supposed to notify him.
Q. The conductor is supposed to notify him?
78 A. And the head brakeman is supposed to go by the engineer's instructions.
Q. The conductor then has only the book of rules to go by, hasn't he?
A. No.
Q. And the engineer, what does he have to go by?
A. We have other instructions, bulletin instructions, that cover more than any book of rules.
Q. There is no rule at all except the rule reading that he is to be on the front part of the train?
A. To be on top of the train going down descending grades.

Q. It says on top or the front portion of the train; do you know any other rule?

A. He is supposed to be far enough back to pass the signals.

Q. Do you know of any such rule requiring him to be a given number of cars back from the engine?

A. No, I am talking about the idea is he should be six or eight cars from the head end of the train of twenty cars to catch the signals.

Q. Is that your idea about it? He would have to be six or eight cars back to do that, would he?

A. Yes, sir; sure.

Q. You tell the jury that?

A. Yes, sir.

Q. In order to catch the signal from the engineer he would have to be six or eight cars back?

A. Six or eight cars back from the head end.

Q. He couldn't do it only three or four cars back?

A. Not like it was there on the curve.

Q. Well, you have narrowed it down to that, to what it was there; the fact is, he is to be on top of the train on that road only when descending Clarksville, Cherry's and Tennessee Ridge grades; isn't that the instructions?

A. How is that?

Q. Your instructions are to have brakemen on top of the train when you descend the three grades, one at Clarksville, one at Cherry's and the other at Tennessee Ridge; isn't that the instructions?

A. The instructions is all grades and all stations.

Q. Why was this rule made then on the card table: Retaining valves must be used on the following grades: Cherry's, Clarksville and Tennessee Ridge?

A. That is only the grades *that* use retaining valves for.

Q. Well, that is what he is on top for?

79 A. That is where they use them retainers, but then they are supposed to be on top at all grades.

Q. Supposed to?

A. Yes, sir, and in approaching all stations.

Q. They are on top to look after these retainers, ain't they?

A. Those three places you mention. Those are the only three places the retainers are used, and the other places they are supposed to be out just the same.

Q. Why are they the only three places where they are used?

A. Because they are the only heavy grades we have and we don't have to use them at any other place.

Q. Don't have to use them at any other place?

A. No, sir.

Q. And your special instructions are of the kind?

A. Yes, sir.

Q. It is a common thing for the brakemen to ride on the engine whenever they get ready except on these grades?

A. No, sir.

Q. Isn't that a common practice?

A. Oh, oftentimes they do it.
Q. Answer the question, Mr. Rainey, isn't it a common practice?
The COURT: Just answer the question you were asked.
A. Well, they ride on the engines very often; yes, sir.

And further this deponent saith not.

F. N. FISHER, called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. KEEBLE, for defendant:

Q. State your name, and position with the Louisville & Nashville Railroad Company, please?
A. F. N. Fisher. I am superintendent of the Memphis line division between Memphis Junction and Memphis, Tennessee.
Q. Between Memphis Junction, Kentucky, and Memphis, Tennessee?
A. Yes, sir.
Q. How long have you been superintendent at Memphis?
A. Since the 15th day of May, 1902.
Q. Prior to that time what position did you hold, Mr. Fisher?
A. Trainmaster at Paris, Tennessee, on the same division.
80 Q. How long were you trainmaster at Paris?
A. Ten years.
Q. Before you were trainmaster what was your position?
A. Chief train dispatcher.
Q. At what place?
A. Paris, Tennessee, on the Memphis line, commencing November 11, 1889.
Q. You have worked for the Louisville & Nashville Railroad at Paris and Memphis, then, continuously since 1889?
A. Yes, sir.
Q. Do you have charge and supervision over the operation of the Memphis line running from Memphis, Tennessee, to Memphis Junction?
A. I have.
Q. Was train No. 115, that had a collision with train No. 112 at Big Sandy, on the date T. W. Lewis was killed, under your supervision?
A. It was.
Q. Now, state to the jury what are the duties of the brakemen on trains of this character in descending grades, approaching or passing stations, and if you have a rule on that point will you point it out. Just state what their duties are and what the rules are?
A. You mean read the rules first?
Q. What are they?
A. The rules require the brakemen descending grades and approaching and running through stations and junctions to be on top of the train, where they can receive signals, where they can respond to the calls of the engineer for brakes, if he should call for them,

and where signals can be repeated from one end of the train to the other if it is necessary for signals to be repeated.

Q. Do they have any duties in reference to looking after the train?

A. It is their duty to watch the running of the train, to see that it is running smoothly and apparently all right, and if not, to give such signals as would cause the train to be stopped so that an inspection and investigation may be made.

Q. Is or not there more likelihood of accident or injury to trains going down grades than on a level?

A. In the increased danger of a train under derailment going down grade would of course be that the train could not stop as quickly as it would on a level tract.

81 Q. Now, will you read the rule that I have mentioned or referred to?

Mr. SAVAGE: Page 128, Mr. Fisher.

The COURT: Is that the same rule that has been read?

Mr. KEEBLE: Yes, sir.

The COURT: That need not be read again.

Mr. KEEBLE: We will just agree then that rule is in the book.

Q. Now, I will ask you, Mr. Fisher, if this rule is observed by the brakemen or not observed, and what is the policy of the superintendent's office and those under him in reference to it?

A. When the rule is not observed, if there is a violation of the rule and the officials of the division know of same, they punish the men for the violation.

Q. You make them—I understand that you make reasonable efforts to enforce this rule?

A. We make every reasonable effort that we can to see that this rule is enforced as much as any important rule that we have; watch it constantly.

Q. Now, I will ask you to state, Mr. Fisher, assuming that a man is a head brakeman of a train, 21 cars, going down grade at Big Sandy—you know where that grade is?

A. Yes, sir.

Q. Would or not it be his duty, under the rule, to be on top of the train, and on what part of the train should he be stationed?

A. How many cars did you say?

Q. About 20 or 21 cars.

A. The head brakeman should be on top of the train all the way down Benton and until he passes on through Big Sandy, under the rule; there being 21 cars, the head brakeman should be from six or eight cars from the engine; and the flagman—rear brakeman—should be on top of the train from two or three cars, or three or four cars, from the caboose, or, better, six cars ahead of the caboose.

Q. Did or not you give instructions to brakemen to divide the train in this manner between them so as to protect the train?

A. We give instructions to brakemen and their conductors in their examinations and in verbal instructions to separate the men on the train according to the number of brakemen they have on the train.

taking into consideration the number of cars they have on the train. Some trains have three brakemen, some have only two.

82 Q. Suppose in going down grade for any reason the air brakes would not work, what would be the duty of the engineer?

A. The engineer would signal to the train crew that the air brakes had failed and call for the hand brakes, and it would be the duty of the brakemen and conductor to very promptly apply the hand brakes.

Q. Do the air brakes ever get out of condition?

A. They do, yes, sir; that is the object of having such a rule.

Q. Well, is not this one of the reasons why you have a rule compelling your brakemen to be on top of the train descending grades?

A. One of the most important reasons is that he shall be right where he can set the brakes if the engineer's air brake fails.

Q. Now, in going down grade, in case a brakeman should observe there was anything wrong with the running gear of any of the cars or any other defect should become apparent, what would be his duty, the brakeman's duty?

A. If the head brakeman should see that, it would be his duty to immediately signal the engineer and flagman, and the flagman would repeat the signal to the conductor, if it was on the rear of the train, and the conductor or flagman would see it, it would be their duty to repeat the signal to the engineer through the head brakeman.

Q. Mr. Fisher, were there any grades for which you had special rules, aside from this general rule, in regard to descent of grades?

A. Yes, sir.

Q. What grades were they?

A. The Clarksville grade, and on the Benton grade and on the Clarksville division north of Paris, at Cherry's.

Q. What special rules did you have for that?

A. We had special rules on account of the grades being so much heavier than other grades, in addition to the regular rules for handling the train with the air brake and hand brake, that the retainers on top of the cars should be turned up going down these grades to assist the engineer.

Q. You say—what three grades are they? Did you say Benton?

A. Cherry's, Clarksville and——

Q. Tennessee Ridge?

A. Tennessee Ridge.

Q. You did not mean to say Benton?

A. If I said Benton I made a mistake. Benton is one of our heavy grades, but I meant Tennessee Ridge, between Erin and Stewart.

83 Q. Now, these rules don't say anything in reference to this position but merely imposes the duty of setting the retainers?

A. Yes, sir; by verbal instructions we tell the men how many retainers to turn up, according to how many cars they have in the train.

Q. Were those rules in force on the company's system when Lewis was killed near Big Sandy?

A. They were.

Q. Is there anything on this sheet here with reference to rules which abrogates that general rule which you have stated?

A. You mean that abrogates the first general rule that I have stated?

Q. The first general rule that you have stated?

A. No, sir.

Q. There is not?

A. No, sir.

Q. You are familiar with that sheet?

A. Yes, sir; I made it.

Q. Sir?

A. I say I made it.

Q. You made it. Why do you turn up these retainers?

A. Why?

Q. Why do you turn up these retainers?

A. Well, the Clarksville grade is 106 feet to the mile, a very heavy grade, and the engineer going down Clarksville hill, a mile long, uses so much air with his air brake on the engine that if he has to release and recharge, then if we didn't have the retainers, the brakemen have got to use the hand brake, and it is not desirable to use the hand brake in connection with the air brake when the air brake is working. The retainer gets the pressure from a reserve of fifteen pounds of air to the square inch in a drum under the car. It is an auxiliary brake to the engineer's brake.

Q. Suppose the train is going around a curve, would a brakeman have a farther view ahead of the train than the engineer in the cab?

A. Yes; the brakeman seven cars back, or ten cars back, anywhere towards the center of the train, could see very clearly going around the curve in both directions, and would only have the distance to see that the engineer would have to see on the engine.

Q. Sir?

A. He would have only half the distance to see that the engineer would have to see on the head of the engine.

84 Q. I am talking about ahead of the engine; could he see the track ahead of the engine further than if he was in the cab if going around the curve?

A. Well, I don't know. Under certain conditions he might, and then again he might not; it depends upon the bushes and trees and the conditions generally. Now, I will add to that: The brakeman might be able to see going around a curve farther than the engineer could, because the brakeman would be on the inside of the curve and the engineer on the outside, but the brakeman under those same conditions likely could not see any further than the fireman on the engine could see at the same time.

Q. I will ask you if you haven't a rule to this effect: "It is of the utmost importance that the proper rules for the government of the employees of a railroad company be enforced in order to make such rules efficient;" if that statement isn't found in your book of rules?

A. Yes, sir.
Q. When a brakeman is employed is he given a book of rules?
A. He is.
Q. Does he give a receipt for them?
A. Yes, sir.

The COURT: That has all been proven.

Cross-examination.

By Mr. LEECH, for the plaintiff:

Q. Mr. Fisher, did you know young Lewis?
A. I did know him, but not as well as I know a good many men, because he hadn't been there but a short time.
Q. You didn't give him any personal instructions when he went in your employ, did you?
A. I did not, not personally myself.
Q. You don't know that anybody else did, do you?
A. Sir?
Q. You don't know that anybody else did, do you?
A. Certainly, just as well as I know I am living.
Q. Now, who did it?
A. Trainmaster, assistant trainmaster.
Q. Did you hear him give him any instructions?
A. I did not.
Q. So you don't know it as a matter of fact, and because as a matter of fact you have a rule requiring that to be done, that is the reason you know it, isn't it?
A. I know more than that.
85 Q. Why?
A. I will explain it to you: I know you cannot run a railroad safely without accident generally as we run ours without the rules being obeyed. I know if the brakeman did not have books of rules and did not obey the rules, we would not have the results that we have, and I know there is no one to employ brakemen and give them the rules and instruct them how to do it other than the trainmaster and assistant trainmaster, and the very fact that the rules are obeyed and the trains run without accident makes me know it absolutely.
Q. That is an argument.
A. That is not an argument; it is absolutely called for.
Q. You tell the jury you saw nobody instruct this man or examine him in reference to this rule, and yet as a matter of fact you know he was instructed that on trains of twenty cars he must be as far back as the sixth car?
A. I know it just as well as I have explained my reasons for knowing it.
Q. Your rule says nothing about whereabouts on the front of the train he should be.
A. The rules are open to the intelligence of the trainmaster as to his instructions, for the reason that some trains carry ten cars, some forty, some have two brakemen and some three; so the brakemen are

instructed by their trainmaster where to ride, according to the number of brakemen and the number of cars in the train.

Q. There is no rule in your book requiring how far back he should be? Answer that question.

A. The rules do not specifically state.

Q. And your testimony is based upon the fact that your company has a book of rules and you are charged with the enforcement of the rules on that division, isn't it?

A. Sir?

Q. I say, your real testimony is based upon the fact that your company has a book of rules and you are charged with the enforcement of the rules on that division, isn't it?

A. No, sir.

Q. On what is it based?

A. The results we get from the operation of our trains under those rules.

Q. That is the way you get it?

A. I know it should be, but the result tells what is done.

Q. You know it is a common practice for the brakemen to ride on the engine, don't you?

A. I do not. I know it is not a common practice.

Q. You know it is not a common practice?

86 A. I know it is not a common practice, and I know I suspended a man yesterday for catching him at it.

Q. You are not on the train all the time, are you?

A. No, sir; I am on the train some.

Q. But your headquarters are in Memphis?

A. My office is in Memphis, and my headquarters are over 300 miles of railroad.

Q. It is left to the conductors and engineers on those trains to see whether the brakemen comply with those rules or not, isn't it?

A. It is left to the conductors and engineers to require it to be done, but it is not left to them to see that that is done, but it is left to the trainmasters.

Q. Where are they?

A. One is at Humboldt and one at Guthrie, one at Paris?

Q. You get your information from the trainmaster?

A. I get part of it, what I don't get personally.

And further this deponent saith not.

Mr. SAVAGE: At the former trial, Your Honor, Conductor Jackson, the conductor of the train that Lewis was employed on, was not here; we could not find him, and it was agreed that he would testify that he did not know Lewis was on the engine at the time of the accident, and Mr. Leech agrees that we may treat that as evidence this time.

Mr. LEECH: Also, that he was on the engine himself at the time.

Mr. SAVAGE: And that he was on the engine himself at the time, but did not know that Lewis was on it.

Mr. LEECH: And that the railroad company required him not to be on the engine.

Mr. SAVAGE: The rule speaks for itself, but it is agreed, gentlemen of the jury, that the conductor was on the engine at the time of the accident, but that he did not know that the brakeman was on the engine.

The defendant here rested its case. This was all of the evidence introduced upon the trial of this case.

Mr. KEEBLE: This is our case, Your Honor. I desire to renew our motion for peremptory instructions.

87 *Motion for Peremptory Instructions.*

The COURT: Has the plaintiff any proof in rebuttal?

Mr. LEECH: I have no more proof.

The COURT: You make your motion and state the grounds.

Mr. KEEBLE: Now, first, this declaration is a declaration for the injury to the deceased person himself, and not for any damages to the next of kin, the father and mother, as provided by statute.

Second, there is no evidence of any pecuniary loss sustained by the beneficiaries, which is essential in a cause of action of this kind.

Third, that there is no allegation of any pecuniary loss in the declaration sustained by the beneficiaries.

Fourth, that when the deceased went in the engine at the time of descending the grade in question, it being uncontroverted in the evidence that it was his duty to be upon the top of the train, he assumed the risk of that position, notwithstanding the employers' liability act of 1908, and his administrator cannot recover, for the reason that an employé not only assumes the ordinary risks of the employment, but under the law he assumes the ordinary risks of any position he takes outside of the scope of his employment when he is not required by the master to take a position of greater peril, or of peril.

We renew the motion and our objection to that evidence.

The COURT: Mr. Leech, have you concluded to make that amendment?

Mr. LEECH: As to the pleading, if the court please?

The COURT: Yes, sir.

Mr. LEECH: Now, let me see if I understand the court on that.

The COURT: I give you leave to amend the declaration so as to show that it is brought for the benefit of the father and mother, and also so as to aver that they (the father and mother) suffered damage by his death.

Mr. LEECH: Well, does Your Honor hold that this allegation does not show that it was for the benefit of the parents; "Whereupon, because of the said negligence, which was gross, wilful and reckless, of the said defendant's officers, agents and employés causing said injuries and death, plaintiff, as administrator of the said intestate, sues the defendant for the benefit of his said parents, in the sum of fifty thousand dollars damages, and asks for a jury to try his case."

88 The COURT: I didn't notice that phrase. I think that it is sufficient. I had overlooked that.

Mr. LEECH: That is in every count.

The COURT: Well, I think that would be sufficient to show that it was for the benefit of the father and mother. Now, then, do you want to amend, on the question of pleading now, so as to aver that they suffered damages by his death?

Mr. LEECH: Now, if the court please, I want to be perfectly frank in this matter. This declaration represents my conception of this case under the statute, and if to amend this declaration so as to allege that they suffered a certain pecuniary loss, I would have to specify what that pecuniary loss was; simply to show they suffered pecuniary loss would not be sufficient, would it?

The COURT: I will not rule on it until you make some amendment. I do not think that would be proper.

Mr. LEECH: Well, I do not want to amend so as to confine this suit to a claim under the statute simply for the loss of any pecuniary benefit or service.

The COURT: In using the word "pecuniary," of course, I would understand it to be services of value that could be measured in money, that would have some money value.

Mr. LEECH: In other words, that we could not recover for anything else except the value of this service.

The COURT: What I mean is, the reasonable expectation of benefit to be measured in money by the continuance of the life. It might be in the form of money that he would earn and pay his parents, or leave his parents, or service that he would render them, or something of that sort.

Mr. LEECH: Suppose he would die, would that feature of it come under that?

The COURT: I don't undertake to answer all these questions, Mr. Leech. You know my views as expressed at the other trial. If you want to amend, I will allow you to amend.

Mr. LEECH: Yes, but as I understand Your Honor's ruling before, and as I understand it now, by pecuniary value is meant simply the value of the services Mr. Lewis would have from his son.

The COURT: The value of that he might reasonably expect to receive, either in money or other things, as distinguished from the value of the son's life itself. In other words, I am clear in the opinion that under the statute that there is no survival of the right
89 of action for the death of the son as such. I have considered it very carefully, in connection with your former argument and other arguments I have heard, and I am still of the same opinion I was before on this subject. Now, if you want to amend your declaration so as to aver damages to the father and mother, you may have leave to do so. If you do not, I will rule on the motion to exclude the evidence, and then I will rule on the motion for peremptory instructions.

Mr. LEECH: No, sir, if the court please, I am going to stand on my conception of this case.

The COURT: Now to what extent is your motion to exclude the evidence, or your objection. What is your motion to exclude?

Mr. KEEBLE: My motion was to exclude all evidence of any

pecuniary value of the life, in so far as his capacity to earn money, or loss that had been sustained, of his expectancy of age, any money, or pecuniary in character, or could be estimated in money.

The COURT: Well, sustain the motion and I exclude the evidence.

To the action of the court in excluding the evidence, plaintiff excepts.

Mr. LEECH: Now in order that there may be——

Mr. KEEBLE: Your Honor, I think he has elected——

Mr. LEECH: I am not going to change my election at all. I want to see the original declaration; I think I have got it in there. My copy shows it is in there. Now, I understand the motion is to take the case from the jury, if the court please.

The COURT: I haven't yet done so. I have now sustained the motion to exclude the evidence looking to the earning capacity of the deceased, and the pecuniary benefits of service that might have been reasonably expected to be received by his parents from a continuance of his life. I sustain that motion, as a matter of pleading, on the ground that the declaration does not allege any special damages of that character, that makes evidence on those matters competent, and I do so especially on the authority of the case of Thompson vs. Chicago R. R. Co., 104 Fed., 845, and the other cases cited in note 12, in 13 Cyc., p. 343, on the question of pleadings.

Mr. LEECH: To this action plaintiff excepts.

The COURT: Then, coming to the question of the motion for peremptory instructions, that leaves the case without any evidence whatever that the parents of this deceased boy had any reasonable expectation of pecuniary benefit or of receiving valuable
90 services from him, capable of being estimated in money, or that they suffered any pecuniary losses or damages that could be estimated in money by reason of his death, and it leaves the case to rest solely upon the theory that the right of action for the death itself survives the right of action which the son himself would have had if he had lived. In my opinion, there is very clear, strong evidence of this young man under circumstances that would create a right of action of some character, under the employers' liability act, the act of Congress of April 22, 1908, provided that act, in the form in which it was originally passed, had provided for the survival of the right of action. In other words, if this statute, gentlemen of the jury, were like the Tennessee statute, and allowed the jury to estimate the value of the life that was destroyed, then I think there would be a clear case to go to the jury. But, after careful consideration of this case, this being the second time I have had this case, I am of the opinion that the federal employers' liability act does not so provide, that it is not like the Tennessee statute in that respect, and that it for some reason failed to make any provision for the survival of the right of action in the case of death to any injured employé, and made no provision for the recovery for the value of a life, and that the only provision that it made in case of death was for a right of action for the beneficiaries who survive him, or for the damages that they suffered,

what they lost by the life, not the value of the life, but what was the loss to them by the taking of the life? What would they reasonably have expected to have received from the dead person if he had lived. How much were they deprived of in a money sense or in any manner which could be estimated in money by his death. Since the act of 1908 was passed Congress has amended the employers' liability act so as to provide for the survival and so as to make a case which should go to the jury, if that amendment had been in force at the time this accident occurred. But, unfortunately for the plaintiff in this case, the accident occurred between the time of the original passage of the act and the time of the amendment, so that the amendment cannot apply; and under the original act there is no survival of the right of action for death, in my opinion—no right of action for the value of the life—and as the plaintiff has not seen fit to amend the declaration and to aver damages to the beneficiaries and there is no evidence of such damage now in the case, having been excluded because of the fact that there is no allegation in the declaration, and the plaintiff rests his case on the other proposition of law. I sustain the motion for peremp-
91 tory instructions, and direct you to return a verdict in favor of the defendant.

Mr. LEECH: I wish to except.

The COURT: You may note your exception.

Mr. LEECH: To the action of the court in excluding the evidence on motion of defendant, as to the value of services—is that the motion, Mr. Keeble?

The COURT: Well, to the extent they were excluded, you may just put it broadly.

Mr. LEECH: For the value of services or pecuniary benefits to the parent, on the ground that there was no allegation in the pleadings upon which to base such proof, plaintiff excepts. To the entire action of the court upon said motion plaintiff excepts.

And to the action of the court after said ruling, in taking the case from the jury—I mean, in instructing the jury to return a verdict for defendant, upon the motion for peremptory instructions, plaintiff excepts. I believe that covers it. To the entire action of the court upon motion for peremptory instructions, plaintiff excepts.

The COURT: Now, gentlemen, you may return your verdict without leaving your seat. Do you so return your verdict? The verdict may be entered.

Mr. LEECH: I want to enter a motion for a new trial.

The COURT: You may enter the motion and you may have ten days, under the rule. You may argue it at any time before I leave here on Saturday, or you may submit it on brief.

Mr. LEECH: I prefer to argue it personally. I will be ready to argue it on Saturday. Then, I have got ten days from the action of the court, on that motion, to get up a bill of exceptions

The COURT: You have, I believe it is, twenty days, after the action on the motion for a new trial. Look at the rules. The clerk will show you the rules on the subject. I think it is twenty, though.

To said action of the court in instructing the jury to find for the

defendant in this case and in overruling the motion for a new trial, plaintiff excepts, and tenders this his bill of exceptions, and asks that the same be signed and sealed and made a part of the record of this case for the hearing on appeal.

92 And this bill of exceptions is signed and sealed accordingly, and made a part of the record.

June 8, 1911.

(Signed) EDWARD T. SANFORD,
U. S. District Judge.

Correct.

(Signed) JNO. B. KEEBLE.
(Signed) H. N. LEECH.

(Endorsed:) C. W. Garrett, admr., vs. Louisville & Nashville R. R. Co. Bill of exceptions. Filed June 8, 1911. H. M. Doak, Clerk.

On June 3 the following petition was filed:

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Petition for Writ of Error. Filed June 3, 1911.

Your petitioner, plaintiff in the above-styled case, feeling himself aggrieved by the verdict and judgment of the Circuit Court of the United States for the Middle District of Tennessee, rendered on May 19, 1911, in said court, by said court, in favor of the Louisville & Nashville Railroad Company, and by the action of the court in overruling plaintiff's motion for a new trial on the 29th day of May, 1911, comes now by attorney of record, H. N. Leech, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Sixth Judicial Circuit, under and according to the law of the United States, in that behalf made and provided, and also that an order be made fixing the amount of the security which plaintiff shall give and furnish upon said writ of error, and upon giving and furnishing said security this case be transferred to the said Circuit Court of Appeals of the United States.

Plaintiff accompanies his petition for a writ of error with his written assignments of error which are intended to be urged by him, and which he asks to be filed by the clerk of the court as a part of the record in this case and this petition.

Your petitioner will ever pray.

(Signed) H. N. LEECH,
Attorney for Plaintiff.

(Endorsed:) No. 3633½. C. W. Garrett, admr., vs. L. & N. R. R. Co. Petition for writ of error. Filed June 3, 1911. H. M. Doak, Clerk.

93 On June 3, 1911, the following assignment of errors was filed:

Assignments of Error.

In the Circuit Court of the United States, Middle District of Tennessee, at Nashville.

C. W. GARRETT, Administrator,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Assignments of Error. Filed June 3, 1911.

Assignments of Error on Behalf of the Plaintiff, C. W. Garrett, Administrator of T. W. Lewis, in the Above-styled case.

1. It was error to exclude the following evidence from the deposition of W. H. Binkley, a witness for the plaintiff:

"State whether he was suffering any or not?

"A. Well, he didn't seem to be suffering a great deal. He said he wanted us to get him out from under there. He said he thought he was just laying under there. I thought he was, too, but when we went to dig him out I saw he was more than hung.

"Q. What was his condition under there?

"A. Burned and mashed by the heat of the boiler and weight.

"Q. After you finally got him out, what indications of suffering did he show?

"A. He showed a great deal of suffering, as soon as they began to raise the boiler off; after the wrecker got there, they set jacks under there and raised the boiler, and as soon as they began to relieve him of the weight he began to flounce around with his body, looked like he was in great agony. The doctor gave him some kind of dope, or something to relieve his pain.

"Q. Gave him something?

"A. He did; gave him something, yes; I don't know what it was."

2. It was error on exception made by defendant to exclude the deposition of Dr. R. D. Cunningham. This deposition concerned the mental suffering, physical pain, condition, etc., of the deceased, when and after the doctor reached him up to his death.

3. It was error to permit proof by W. B. Davis on cross-examination as to the expectancy of the deceased's father and mother.

94 4. It was error to exclude on motion of defendant all evidence of any "pecuniary value of the life, in so far as his—deceased's capacity to earn money, or loss that had been sustained, of his expectancy of age, any money, or pecuniary in character, or could be estimated in money."

5. It was error to sustain the motion made by defendant for peremptory instructions upon any one or all of the four grounds of said motion. Said motion was in the following words:

"First, this declaration is a declaration for the injury to the de-

ceased person himself, and not for any damages to the next of kin, the father and mother, as provided by statute.

"Second, there is no evidence of any pecuniary loss sustained by the beneficiaries.

"Third, there is no allegation of any pecuniary loss in the declaration sustained by the beneficiaries.

"Fourth, that when the deceased went in the engine descending the grade in question, it being uncontroverted in the evidence that it was his duty to be on top of the train, he assumed the risks of that position, notwithstanding the employers' liability act of 1908, and his administrator cannot recover, for the reason that an employee not only assumes the ordinary risks of the employment, but under the law he assumes the ordinary risks of any position he takes outside of the scope of his employment, when he is not required by the master to take a position of greater peril, or of peril.

6. It was error not to sustain the grounds of the motion for a new trial; it being error not to sustain every one of the five grounds set out in said motion, as a whole, and in not sustaining each one of said five grounds in itself as sufficient to set aside the judgment and verdict given and rendered in the cause.

7. It was error for the court to hold that the declaration was insufficient to permit evidence looking to the earning capacity of the deceased and the pecuniary benefits of service that might have been reasonably expected to be received by his parents from a continuance of his life, etc.

8. It was error for the court to hold that under this declaration damages could not be recovered for the death or pecuniary loss of the deceased—that is, for the pecuniary value of his life—nor for his mental and physical suffering.

9. The measure of damages under this declaration, and under the act of Congress before mentioned, is for the pecuniary value of the life of the deceased and for his mental and physical suf-
95 fering in event of his death; and damages of both classes can be recovered in an action by his personal representative. It was error to hold otherwise.

10. The declaration was sufficient under the act of Congress, known as the employers' liability act of April, 1908, and the case should have gone to the jury to pass upon the issues presented by the pleadings, with instructions that in the event they should find for the plaintiff they could or should allow damages for his mental and physical suffering, in this case, there being no other expense worth while prior to his death, and for pecuniary value of his life to be determined by a consideration of his age, earning capacity, etc. To have held otherwise upon the motion for peremptory instructions was error.

Wherefore, because, and on account of each and all of the foregoing error- assigned, the plaintiff prays and asks that the verdict and judgment be reversed.

(Signed) H. N. LEECH,
Attorney for Plaintiff.

(Endorsed:) No. 3633½. C. W. Garrett, Administrator, vs. L. & N. R. R. Assignment of Errors for Plaintiff. Filed June 3, 1911. H. M. Doak, Clerk.

On June 9, 1911, the following order was entered:

In the United States Circuit Court for the Middle District of Tennessee.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

On this June 9, 1911, came the plaintiff by his attorney, and having filed herein and presented to the court his petition, praying for the allowance of writ of error and assignment of error- intended to be urged by *her*, and praying that the transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court doth allow the writ of error upon plaintiff giving bond according to law in the sum of $250.00, which shall operate as a supersedeas bond.

(Signed) EDWARD T. SANFORD,
U. S. District Judge, Holding the Circuit Court.

(Endorsed:) No. 3633½. C. W. Garrett, Administrator, vs. L. & N. R. R. Co. Order allowing writ of error. Entered Book 66, page 657.

96 The following is a copy of the writ of error allowed:

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Middle District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some or you, between C. W. Garrett, administrator of T. W. Lewis, Jr., plaintiff, and the Louisville & Nashville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said C. W. Garrett, administrator, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the

same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ of error, so that you have the same at Cincinnati, in said Circuit, on the 19th day of August, next, in the said Circuit Court of Appeals, to be then and there held, *just* the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and eleven, and of the independence of the United States of America the one hundred and thirty-sixth.

(Signed) H. M. DOAK,
Clerk of the Circuit Court of the United States,
Middle District of Tennessee.

Allowed by:
Hon. EDWARD T. SANFORD, *Judge.*

On June 3, the following bond was filed:

Know All Men by These Presents, That we, C. W. Garrett, administrator, as principal, and H. N. Leech, as surety, are held and firmly bound unto the L. & N. R. R. Co. in the full and just
97 sum of $250.00, to be paid to the said L. & N. R. R. Co., certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 3rd day of June in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Circuit Court of the United States for the Middle District of Tennessee, in a suit pending in said court, between C. W. Garrett, administrator, a judgment was rendered against the said C. W. Garrett, administrator, and the same C. W. Garrett, administrator, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said L. & N. R. R. Co., citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden in the city of Cincinnati, in said circuit, on the 19th day of August, next.

Now, the condition of the above obligation is such, that if the said C. W. Garrett, administrator, shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence

[SEAL.] C. W. GARRETT,
Administrator, etc.,
[SEAL.] By H. N. LEECH.
[SEAL.] H. N. LEECH.

Approved by
H. M. DOAK, *Clerk.*

(Endorsed:) No. 3633½. C. W. Garrett, Admr., vs. L. & N. R. R. Co. Bond on Writ of Error on Appeal to the United States Circuit Court of Appeals for the Sixth Circuit. Filed June 3, 1911. H. M. Doak, Clerk.

On June 16, 1911, the following was filed:

C. W. GARRETT, Adm'r, etc.,
vs.
LOUISVILLE & NASHVILLE R. R. Co.

To H. M. Doak, Clerk of the Circuit Court of the United States for the Middle District of Tennessee:

As the attorney for the plaintiff in the cause of C. W. Garrett, administrator, etc., against the Louisville & Nashville R. R. Co., in compliance with the act of Congress, approved February 13, 1911, and rule No. 102 of the Circuit Court for the Middle District of Tennessee, I respectfully request that the entire record as it was
98 and is in said Circuit Court be made up and printed as the transcript *or* record, to be carried to the United States Circuit Court of Appeals under the writ of error granted for that purpose.

In other words, the case is such that it cannot be presented by omitting any part of the record, as may be done under the terms and conditions provided for in said act of February 13, 1911.

I understand that under said act and said rule No. 102 that the appellant may request that the record on an appeal or writ of error to the United States Circuit Court of Appeals be made up of the entire record just as it was done before the passage of said act of February 13, 1911, and this is the purpose of filing this paper with you, as the Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

(Signed) H. N. LEECH,
Attorney for Appellant, C. W. Garrett, Administrator of T. W. Lewis, Jr.

(Endorsed:) No. 3633½. C. W. Garrett, Adm'r, vs. L. & N. R. R. Co. Plaintiff's designation of transcript. Filed June 16, 1911. H. M. Doak, Clerk.

On June 20, 1911, the following letter was filed:

Louisville & Nashville Railroad Company,
Office of District Attorney.

NASHVILLE, TENN., *June* 19, 1911.

Mr. H. M. Doak, Clerk, Nashville, Tenn.

DEAR SIR: The enclosed from Mr. Leech explains itself.
I think in the case of Garrett, administrator, vs. L. & N. R. R.,

that we had better have a complete copy of the record. It is short and the points are very finely drawn.

Yours truly,

(Signed) JNO. B. KEEBLE,
District Attorney.

(Endorsed:) No. 3633½. C. W. Garrett, adm'r, vs. L. & N. R. R. Co. Defendant's agreement to the printing of the entire record. Filed June 20, 1911. H. M. Doak, Clerk.

99 UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The United States Circuit Court of Appeals for the Sixth Circuit.

To the Louisville & Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the 19th day of August, next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Middle District of Tennessee, wherein C. W. Garrett, administrator of T. W. Lewis, Jr., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against him, the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward T. Sanford, Judge of the District Court at Nashville, within said circuit, this the 21st day of July, in the year of our Lord one thousand nine hundred and eleven, and of the American Independence the one hundred and thirty-fifth year.

EDWARD T. SANFORD,
U. S. District Judge.

Service of the foregoing citation is hereby waived, this the 21st day of July, 1911.

JNO. B. KEEBLE,
Attorney for the Defendant in Error.

I, H. M. Doak, Clerk of the Circuit Court of the United States for the Middle District of Tennessee, hereby certify that the foregoing is a true, perfect and complete transcript of the record in the above-styled cause, as the same is of record or on file in my office. In witness whereof I have hereunto signed my name and affixed the seal of the court, at my office in Nashville, this the 21st day of July, 1911.

H. M. DOAK, *Clerk.*

100 And afterwards to wit on August 19, 1911, praecipe for appearance of counsel was filed which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error.
H. N. LEECH.

And afterwards to wit on May 10, 1912, an entry was made on the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Before Warrington, Knappen, and Denison, C. JJ.

101 This cause is argued by Mr. H. N. Leech for the Plaintiff in Error and by Mr. John B. Keeble for Defendant in Error and is submitted to the Court.

And afterwards towit on July 17, 1912, judgment was entered in said cause clothed in the words as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this

cause be and the same is hereby reversed and a new trial
102 awarded (without costs), unless plaintiff through his counsel shall within sixty days after the entering of this judgment, cause written notice to be filed with the Clerk of this Court that further opportunity to amend is declined; in that event the judgment will stand as affirmed with costs. The mandate will be withheld sixty days.

And afterwards towit on July 27, 1912, an opinion was filed in said cause in the words and figures as follows:

Opinion.

103 Filed Jul- 27, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Plaintiff in Error,
v.
LOUISVILLE & NASHVILLE RAILROAD Co., Defendant in Error.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

Submitted May 10, 1912; Decided July 17, 1912.

Before Warrington, Knappen, and Denison, Circuit Judges.

This action was originally brought in the Circuit Court of Houston County, Tennessee, and on petition of the railroad Company was removed to the court below. The declaration contains three counts, and in each it is alleged that "plaintiff is a citizen of the State of Kentucky, and is the administrator of T. W. Lewis, Jr. by appointment of the County Court of Stewart County, Tenn."; that defendant is a corporation under the laws of the State of Kentucky; that at the time in question, September 27, 1909, defendant was engaged in commerce between the states of Kentucky and Tennessee and other states; and that deceased was on that date in the employ of the company as a brakeman on one of its freight trains, and through negligent telegraphic orders the train was brought into collision with another freight train of the company which resulted in the death of plaintiff's intestate. The alleged negligent acts are variously
104 stated and ascribed to the company, its engineer and conductor in charge of the train, and two of its telegraph operators in sending and reading the dispatch; that in an effort to save his life by jumping from the engine on which he was at the time riding, when it was seen that collision was imminent, deceased with-

out fault on his part was caught under the engine and held there for six hours or more, suffering intense agony and pain from both the weight of the engine and hot water from the boiler, in consequence of which he died shortly after the engine was removed from his body. In each of the counts, it is alleged that at the time of his death deceased was twenty-four years of age, was strong and vigorous and of fine business qualifications and earning capacity; in the first and second counts that he left surviving him T. W. Lewis, his father, and Mrs. T. W. Lewis, his mother; in the third count that he left surviving him not only his father and mother, as stated, but also brothers and sisters, whose names are not stated. In the first and second counts it is alleged, that plaintiff sues for the benefit of decedent's parents, and in the third count simply as administrator of deceased, but in each count for $50,000 damages.

In the petition for removal, it is alleged among other things that the railroad company was incorporated by act of the General Assembly of Kentucky, approved March 5, 1850, was never incorporated under the laws of the State of Tennessee, and is an existing corporation under the laws of Kentucky; that for the sole purpose of preventing removal of the action plaintiff, although a citizen of Kentucky, sued in his official capacity as administrator; that under Chap. 501 of the Acts of that state of 1903 he was for the purposes of the suit a citizen of Tennessee; that this is a controversy between citizens of different states; and that the suit is brought to recover damages for alleged wrongful killing of deceased under the Second Employers' Liability Act of Congress of April 22, 1908.

The order for removal states as its basis simply that the petition with proper bond was presented before the time the railroad company was required by the laws of Tennessee or rules of court to answer or plead to the declaration. Subsequently the railroad company filed in the court below pleas of not guilty and contributory negligence, to each of which replication was made. Both parties presented the evidence and the cause was tried upon the theory that the
action was based on the Second Employers' Liability Act of
105 Congress. At the close of all the evidence, a motion to direct a verdict for defendant was granted; and the case is prosecuted here upon assignments of error.

So far as the record discloses, no motion to remand the cause to the state court was made. The act of Tennessee, upon which the railroad company founds the averment, as stated, that plaintiff below is a citizen of Tennessee, provides that whenever a non-resident of Tennessee qualifies in that state as an administrator of a person dying or leaving assets or property in the state, "for the purpose of suing and being sued he shall be treated as a citizen of this state." (Acts 1903, p. 1344.)

WARRINGTON, *Circuit Judge*:

We take it that no question of jurisdiction of the trial court can arise; for assuming, without deciding, that removal of the cause from the state court to the court below was not warranted upon the ground

of alleged diversity of citizenship (Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 924—C. C. A. 6th Cir.—; Amory v. Amory, 95 U. S. 186, 187; Continental Ins. Co. v. Rhoads, 119 U. S. 239, 240; McDuffie v. Montgomery, 128 Fed. 105, 107; Acts of Tennessee, 1903, Chap. 501, p. 1344)—a matter that the parties could not waive (Chi. B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 419)—still, the action might originally have been brought and maintained by plaintiff in a federal court (Act of Congress August 13, 1888, 25 Stat. L. 433, Chap. 866, Sec. 1; Act of Congress April 22, 1908, Chap. 149, Sec. 1, 35 Stat. L. 65; Second Employers' Liability Cases, 223 U. S. 55, 56, 57). True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers' Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in interstate commerce; such averments rendered the federal act alone applicable, and, further, the case was tried and disposed of below upon that theory (Second Employers' Liability Cases, supra; Smith v. Detroit, T. S. L. Ry. Co., 175 Fed. 507; Cound v. Atchison, S. F. Ry. Co., 173 Fed. 531; Erie R. Co. v. White, 187 Fed. 556, 558—C. C. A. 6th Cir.—). True, also, through the removal, the suit was maintained in a federal district of which the defendant was not a resident (Smith v. Detroit, T. S. L. R. Co., supra, p. 508, and cases there cited); but since the parties could and did accept the jurisdiction of the court be-
106 low (In re Moore, 209 U. S. 496, 505; Kreigh v. Westinghouse & Co., 214 U. S. 252, 253; Erie R. Co. v. Kennedy, 191 Fed. 332, 334—C. C. A. 6th Cir.—; Hubbard v. Chicago, M. & St. P. Ry. Co., 176 Fed. 994, 997; Detroit Trust Co. v. Pontiac Savings Bank, 196 Fed. 29, 32 (C. C. A. 6th Cir.), the removal cannot be and is not questioned.

We thus reach the merits of the case. The motion to direct a verdict hinged upon a construction of the Act of Congress mentioned. The issue, as stated by the learned trial judge, was, whether the act provides for the survival of the action that accrued to the decedent before his death, or for an action to recover damages for the death. The trial court took the latter view. As we interpret the assignments of error, the issue as stated and the ruling of the court present the principal question that is open here; that is, whether this is a survival act. The errors complained of in substance concern (1) the ruling out of evidence showing the pain and suffering of deceased while held under the engine; (2) the receiving of evidence "as to the expectancy of the deceased's father and mother"; (3) the exclusion of evidence of the "pecuniary value of the life," etc.; (4) the ruling "that the declaration is insufficient to permit evidence looking to the earning capacity of the deceased." We may say in passing that the reason for this latter ruling was that while the declaration avers in two counts that the plaintiff sues for the benefit of the parents, it fails to allege special damages. The court tendered leave to amend the declaration so as to state the damages claimed to have been sustained by the father and mother through the death of their son; but learned counsel declined to amend, stating that he would stand on his "con-

ception of this case." The court then ruled out the evidence indicated by the assignments, which had been previously admitted subject to exception, and granted the motion to direct.

Did the action that accrued to the decedent survive to his parents? There can be no doubt of the torture that deceased endured while under the engine; nor can there be any doubt that if he had survived he would have been entitled (if he recovered at all) to substantial damages for that reason and for other reasons equally obvious. That action either survived to his parents or it did not. The act provides that the carrier:

107 "* * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents," etc.

It will be observed that the liability imposed is in damages (1) to the employé; (2) to the personal representative, for the benefit of (*a*) the surviving widow * * * and children, and, if none, then (*b*) such employé's parents, and, if none, then (*c*) the next of kin dependent upon such employé. The damages mentioned are allowed in favor of different classes of persons, differently related to the deceased employé. The classes vary and the purpose would seem to follow that the damages should also vary. The damages allowed to the injured employé are but declaratory of rights existing at common law; the damages allowed to the beneficiaries specified are dependent solely on the statute. It is easy to perceive why ordinarily the widow and children would suffer damages greater than would the parents or next of kin. Indeed, the next of kin may be many in numbers, but none can recover without showing dependency. It is therefore hard to discern in this act a legislative intent to bestow the right of action so declared in favor of the injured employé, upon these classes of beneficiaries alike according as one or another should happen to survive the deceased. It is true as is claimed that subsequently to this accident, Congress by amendment enacted that "any right of action" given by the act to the person injured "shall survive to" his personal representative, for the benefit of the same classes of beneficiaries as those named in the act now in question (Act April 5, 1910, 36 Stat. L. 291); but that is legislation.

In Fulgham v. Midland Valley R. Co., 167 Fed. 660, Judge Rogers in construing the act now in issue, after speaking of changes made in the act to the advantage of the employé, said (663): "But it will be observed on the other hand that the act makes no provision for the survival of that action, so given, for an injury sustained, in the event of the death of the injured employé." While that case was reversed (Midland Valley R. Co. v. Fulgham, 181 Fed. 91, 95—C. C. A. 8th Cir.—), yet the reason assigned for the reversal was the fail-

108 ure to show negligence of the company, the question of survival of action not being considered. But in St. Louis & S. F. R. Co. v. Duke, 192 Fed. 306 (C. C. A. 8th Cir.), Judge

Adams, speaking for the court, in effect denied the survival theory under the act in question here, saying (309, 310):

"The rule is that compensatory damages only can be awarded in such cases as this. The actual pecuniary loss resulting to the widow and children occasioned by the death of the father is all that can be allowed."

In Walsh v. New York, N. H. & H. R. Co., 173 Fed. 495, the late Judge Lowell in construing the act (following Judge Rogers' ruling), said:

"* * * we must here hold that the cause of action did not survive, * * *. As the statute is in many respects loosely drawn and ambiguous, so that the intent of Congress does not always appear clearly, the court is justified in saying that this result has been reached with reluctance."

In Fithian v. St. Louis & S. F. Ry. Co., 188 Fed. 842, in passing upon the act Judge Trieber said (844):

"The importance of having the relationship of the parties for whose benefit the action is brought set out is apparent from the fact that this act does not provide for the survival of the cause of action which the deceased had at the time of his death, but is a new cause of action solely for the benefit of those dependent upon the deceased, and the measure of damages is the pecuniary loss sustained by those for whose benefit the remedy is given."

See also Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 135.

We are constrained to hold that the right of action declared in favor of the employé does not in case of his death survive; but a new and different right of action is created: an action to recover damages for the wrongful death of the employé. As regards damages, the right of action of the employé (Lewis) involved only consequences of his injury; the new right of action involves only consequences of his death. These consequences are distinct and must not be confused. For example, the employé's pains resulting from the injuries were suffered by him, not by the beneficiaries; and the new right of action furnishes the beneficiaries no solution for their distress of mind; their damages are measured by their pecuniary loss. (Hulbert v. City of Topeka, 34 Fed. 510, 513, 514, by the late Justice Brewer; Pennsylvania Railroad Co. v. Butler, 57 Pa. St. 335, per Judge Sharswood; Perham v. Portland Electric Co., 33 Ore., 458,
109 463, 464.) The inherent difficulty of estimating the pecuniary value of a life is of course universally recognized; and it is not surprising that the numerous and familiar efforts of courts to lay down rules, with a view of securing practical uniformity in results, have not accomplished the end so much to be desired. The problem necessarily ends in yielding much latitude to the jury in estimating damages in such cases. Thus, in Railroad Co. v. Barron, 72 U. S. 90, appreciating the nature of the task of estimating the damages that would have accrued to the injured person had he survived (in effect denying survival of that action, p. 105), and likewise the damages that should be accorded to the beneficiaries in case of his death, Justice Nelson said (106):

"There is difficulty in either case in getting at the pecuniary loss

with precision or accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury."

That case is much relied on by plaintiff. An Illinois statute was involved, and its important sections are quoted in the statement of the case. In Dist. of Col. v. Wilcox, 4 App. Cases (D. C.), 119, it appears that the Barron case was tried below before Justice Davis and Judge Drummond with a jury. The statute is still in force (Ill. Rev. Stat. of 1908, Chap. 70, p. 1184), except as to limit of recovery, and has frequently been construed by the Supreme Court of that state; but whether at all times in harmony with the decision in the Barron case, or to what extent that decision may ultimately be applicable to this case, need not now be considered (*a*). As we understand counsel's chief reliance upon the Barron case, it is to show that it is not necessary to prove in this case that the parents had a legal claim on the deceased for support. That case so rules and, in connection with the evidence, ought to be an answer to the issues discussed by counsel whether recovery should be limited to nominal damages. The evidence ruled out because of failure specifically to allege damages resulting to the parents from the death, im-

(*a*) A number of the Illinois cases are referred to in Rhoads v. C. & A. R. R. Co., 227 Ill. 328, the decision in which was made "with the Barron case in mind" (337), and still others in the more recent case of Dukeman v. C. C. C. & St. L. R. R. Co., 237 Ill. 104; see also Chicago N. W. R. Co. v. Swett, Adm'r, 45 Ill. 197, 204, 205, decided shortly after the Barron case.

110 presses us as being sufficient, if believed by the jury, to justify recovery for more than nominal damages. Thus, as respects damages, there was evidence tending to show: that the father was the owner of about 1,800 acres of land and the largest farmer in his neighborhood, raising corn, tobacco, wheat, hay, live stock, etc.; that he was seventy-one years of age and growing feeble; that he relied on deceased as the manager of this farm; that deceased was strong in physique and health, was well educated and possessed of good business qualifications and of aptitude for all kinds of machinery, including such as is used on a farm; that when he went away to engage in railroad work he stated that he would be back to gather the corn; that he was unmarried and lived with his father and mother as one of the family; that he raised crops of his own on the farm, and while he was not in receipt of fixed wages from his father, he was in the habit of receiving money from him when he desired it. It is safe to say that prima facie this presented a reasonable expectation of benefit from the continuance of the son's life, which, with proof of the value of such benefit, was susceptible of estimate of pecuniary loss to the father, as also to the mother, who was some eight years younger than the father; (as illustrative of measure of damages where parents were interested as beneficiaries, see Franklin v. South Eastern Ry. Co., 3 H. & N. 212, 214; C. & E. I. R. R.

Co. v. Beaver, 199 Ill. 34, 38; North Pennsylvania R. R. Co. v. Kirk, 90 Pa. St. 17; Hutchins v. St. Paul, Minn. & Manitoba Ry. Co., 44 Minn. 5, 10; as to damages where widow and minor children were beneficiaries under the act now in question, see St. Louis & S. F. R. Co. v. Duke, supra, pp. 309, 310). However, since the learned trial judge did not reach the point of instructing the jury, it is neither necessary nor proper as a reviewing court to attempt, in advance of a judgment on the merits, further to particularize as to evidence ruled out, or as to the elements that should be embraced in the measure of damages to be applied in the case. An example of this course may be seen in American R. R. Co. v. Birch, 224 U. S. 547; indeed, any other course might result in passing on matters that might never arise in the case.

As to the necessity for amendment, it is to be observed as set out in the statement, that plaintiff simply sues for the benefit of decedent's parents in the first and second counts, and as administrator in the third count. He does not allege anywhere in the dec-
111 laration that the parents of the deceased suffered any pecuniary loss or injury through his death. The theory seems to have been that it was necessary to state only facts sufficient (1) to give the court jurisdiction; (2) to show the employment of the deceased and the negligence resulting in his death; (3) to state the names of the particular beneficiaries for whose benefit the suit is brought, and also the amount of damages sued for. It may be conceded, for present purposes, that if a widow and children had survived and the action were maintained for their benefit, the law would presume substantial damages, and so dispense with the necessity of specific averment in that behalf (Dukeman v. C. C. C. & St. L. R. R. Co., supra, p. 109); in some jurisdictions even the relationship or connection of the beneficiaries is not deemed important in this respect (Pennsylvania Co. v. Coyer, Adm'x, 163 Ind. 631; Knife & Bar Co. v. Hathaway, 17 Ohio Cir. Dec. 750, 751, and cases there cited). But the decedent in this case was twenty-four years of age and unmarried at the time of his death, and we are convinced that the better practice is, at least as to such beneficiaries as are involved here, to require the nature of the damages claimed to have been suffered in consequence of the death to be averred. This results from the conclusion that the action which accrued to the deceased prior to his death did not survive. We have already pointed out that the third class, the "next of kin," provided for in the act is specifically limited to such as were "dependent upon such employé." This provision at once furnishes the token for identifying the beneficiaries and prescribes the condition of recovery. Is it to be said that such identification and condition need not be averred? Since it is not uncommon experience that a son past legal majority, as well as a minor son, may be an expense to his parents, it is more consonant with the reason disclosed by the act in respect of next of kin to hold that averment of pecuniary loss or injury is likewise necessary in regard to parents, although dependence, in the sense in which that term is used in the statute with reference to next of kin, is not essential to a recovery for the benefit of parents.

In Hurst v. Detroit City Railway, 84 Mich. 539, 547, it was held, concerning this class of cases generally, that "it is necessary to a recovery in such cases that the pecuniary loss be alleged in the declaration and that some proof be introduced to establish the facts so alleged." See cases there cited; also Regan v. Chicago, Mil-
112 waukee & St. Paul Ry., 51 Wis. 600, 601; Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 683; Norfolk Nat. Bank v. Flynn, ibid. 252; Winnt v. I. & G. N. R. R. Co., 74 Tex. 32, 36; Greenwood v. King, 82 Neb. 20, 21; also L. & N. Ry. Co. v. Summers, 125 Fed. 719, 722 (C. C. A. 6th Cir.), where it was held unnecessary to allege that the beneficiaries had theretofore received pecuniary benefit from the deceased, the material question being whether they would have been likely to receive any if his life had not been cut short.

Ordinarily, it would result that the assignments should be overruled and the judgment affirmed. But we infer from the record that the opportunity given to amend was declined through counsel's misapprehension of the trial court's statements touching the effect of averment in relation to pecuniary benefits and damages. The order therefore is that the judgment will be reversed and a new trial awarded (without costs), unless plaintiff through his counsel shall, within sixty days after the entering of this judgment, cause written notice to be filed with the clerk of this court that further opportunity to amend is declined; in that event the judgment will stand as affirmed with costs.

113 And afterwards towit on September 16, 1912, notice that further opportunity to amend is declined was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The judgment entered in this cause July 17th, 1912, reversing it and remanding for a new trial unless plaintiff should within sixty days, after the entering of said judgment, cause written notice to be filed with the Clerk of this Court that further opportunity to amend is declined, not being final so as to admit of a writ of error to carry the same to the Supreme Court of the United States under Sec. 241 "The Judicial Code", the plaintiff below and appellant in this Court comes by his attorney of record H. N. Leech and declines to make any amendment to the declaration in order that the case may be taken by writ of error to the Supreme Court
114 of the United States for the purpose of having construed the Act of Congress involved in this case approved April 22nd, 1908, known as the "Employers' Liability Act."

C. W. GARRETT, *Adm., &c.,*
By H. N. LEECH, *Att'y.*
H. N. LEECH, *Att'y for Def't.*

And afterwards on the same day, towit September 16, 1912, a petition for writ of error to the Supreme Court was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Petition for Writ of Error.

Your petitioner, C. W. Garrett, Administrator, etc., Plaintiff in Error in the above styled case, respectfully shows that the above entitled case is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that on July 17th, 1912, a judg-
115 ment was rendered in said case reversing and remanding it for a new trial, without costs unless Plaintiff in Error through his counsel of record should within sixty days after the entering of said judgment cause written notice to be filed with the Clerk of said Court that further opportunity to amend his declaration was declined, and Plaintiff in Error further states that on this day of September 16th, 1912, he has filed by his counsel of record in the said Circuit Court of Appeals with the clerk thereof, his declination of any further opportunity to amend his declaration in the above entitled case, and thereby the said case stands affirmed according to the terms of the said judgment of said Court, and is thereby made a final judgment from which a writ of error can be prosecuted as a matter of right to the Supreme Court of the United States under Section 241 "The Judicial Code"—the matter in controversy in said suit being in excess of One Thousand Dollars, besides costs, and the jurisdiction of the said Circuit Court of Appeals, and the United States Circuit Court for the Middle District of Tennessee, from which the above styled case came to the said appellate court by writ of error, not having depended in
116 any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and the said cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and is not an admiralty case; that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and petitioner feeling himself aggrieved by the said judgment affirming the judgment of the Circuit Court of the United States for the Middle District of Tennessee instructing the jury in said case to bring in a verdict for the defendant, would respectfully pray that a writ of error be allowed him in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said Plaintiff in Error may be reviewed, and if

error be found, corrected according to the laws and customs of the United States.

117

C. W. GARRETT,
Administrator, etc.,
By H. N. LEECH, *Att'y.*
H. N. LEECH.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $500.00.

LOYAL E. KNAPPEN,
Judge United States Circuit Court of Appeals for the Sixth Circuit.

And afterwards on the same day towit September 16, 1912, assignments of error were filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr.
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Assignments of Error Filed with Petition for Writ of Error to the Supreme Court of the United States in the Above-styled Case.

I.

It was error for the United States Circuit Court of Appeals for the Sixth Circuit to overrule the Assignment of Error to the action of the Trial Judge ruling out of the evidence as incompetent any and all testimony showing the pain and suffering of the

118 deceased while held under the engine as a result of the collision of the two freight trains in question.

The testimony of the witness W. H. Binkley on this subject so excluded was as follows:

Q. State whether he was suffering any or not?

A. Well, he didn't seem to be suffering a great deal. Said he wanted us to get him out from under there. He said he thought he was just laying under there. I thought he was too, but when we went to dig him out I saw he was more than hung.

Q. After you finally got him out, what indications of suffering did he show?

A. He showed a great deal of suffering, as soon as they began to raise the boiler off; after the wrecker got there, they set jacks under there and raised the boiler, and as soon as they began to relieve him of the weight he began to flounce around with his body, looked like he was in great agony. The doctor gave him some kind of dope, or some thing to relieve his pain.

Q. Gave him some thing?

A. He did; gave him some thing, yes; I don't know what it was.

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II.

It was error in said Court to overrule the Assignment of Error to the action of the Trial Judge excluding on exception by the defendant the entire deposition of Dr. R. D. Cunningham. This deposition concerned the mental suffering, physical pain, condition, etc., of the deceased, when and after the doctor reached him up to his death.

III.

It was error in said Court to sustain the Trial Judge in the ruling that it was competent for W. B. Davis on cross-examination by the defendant to show the life expectancy of the deceased's father and mother—that of the father being shown to be about eight years and that of the mother about five years.

IV.

It was error in said Court to overrule the Assignment of Error to the action of the Trial Judge in excluding on motion of defendant evidence that had been given, and permitted to go before the jury, as to the pecuniary value of the life, in so far as his—

120 deceased's—capacity to earn money or loss that had been sustained, of his expectancy of age, any money, or pecuniary in character, or could be estimated in money."

V.

It was error in said Court to overrule the Assignment of Error made to the action of the Court on the trial below sustaining the motion made by the defendant for peremptory instructions, upon each and every one of the four grounds of said motion by defendant —which said motion was in the following words:

First, this declaration is a declaration for the injury of the deceased person himself, and not for any damage to the next of kin, the father and mother, as provided by the Statute.

Second, there is no evidence of any pecuniary loss sustained by the beneficiaries.

Third, there is no allegation of any pecuniary loss in the declaration sustained by the beneficiaries.

Fourth, that when the deceased went in the engine descending the grade in question, it being uncontroverted in the evi-

121 dence that it was his duty to be on top of the train, he assumed the risks of that position, notwithstanding the "Employers' Liability Act of 1908, and his Administrator cannot recover, for the reason that an employee not only assumes the ordinary risks of the employment, but under the law he assumes the ordinary risks of any position he takes outside the scope of his employment, when

he is not required by the master to take a position of greater peril, or of peril."

VI.

It was error in said Court in not sustaining the sixth Assignment of Error made to the action of the Trial Judge, reading thus:

It was error not to sustain the grounds of the motion for new trial; it being error not to sustain every one of the five grounds set out in said motion, as a whole, and in not sustaining each one of said five grounds in itself as sufficient to set aside the judgment and verdict given and rendered in the case.

VII.

It was error in said Court in not sustaining the seventh Assignment of Error made to the action of the trial Judge, reading
122 thus:

"It was error for the Court to hold that the declaration was insufficient to permit evidence looking to the earning capacity of the deceased, and the pecuniary benefits of service that might have been reasonably expected to be received by his parents for the continuance of his life, etc."

VIII.

It was error in said Court in not sustaining the eighth Assignment of Error made to the action of the Trial Judge, reading thus:

"It was error for the Court to hold under this declaration damages could not be recovered for the death or pecuniary loss of the deceased, that is, for the pecuniary value of his life—or for his mental and physical suffering."

IX.

It was error in said Court in not sustaining the ninth Assignment of Error made to the action of the Trial Judge, reading thus:

"The measure of damages under thi*d* declaration, and under the Act of Congress before mentioned, is for the pecuniary value
123 of the life of the deceased and for his mental and physical suffering in the event of his death; and damages of both classes can be recovered in an action by his personal representatives. It was error to hold otherwise."

X.

It was error in said Court in not sustaining the tenth Assignment of Error assigned in said Court of Appeals, reading thus:

"The declaration was sufficient under the Act of Congress, known as the Employers' Liability Act of April, 1908, and the case should have gone to the jury to pass upon the issues presented by the pleadings, with instructions that in the event they should find for the plaintiff they could or should allow damages for his mental and physical suffering, in this case there being no other expense worth while prior to his death, and for the pecuniary value of his life to

be determined by a consideration of his age, earning capacity, etc. To have held otherwise upon the motion for peremptory instructions was error."

XI.

It was error in said Court of Appeals to hold that the
124 measure of damages recoverable under the Employers' Liability Act of April 22nd 1908 is confined to compensatory damages for the actual pecuniary loss resulting to the beneficiaries named in said statute.

XII.

It was error in the said Court of Appeals to rule that in this case the plaintiff could only recover for the actual pecuniary loss sustained by the father and mother in this case.

XIII.

It was error for said Court of Appeals to hold that the mental and physical suffering of the deceased could not be recovered for in this action.

XIV.

It was error in said Court of Appeals to hold that under said Statute the pecuniary value of the life of the deceased, to be determined by the jury from consideration of his age, his life expectancy, physical strength, health, earning capacity, etc., could not be recovered for under said Statute in this action.

125 XV.

It was error for the said Court of Appeals to hold that the declaration as framed was not sufficient in its allegations to recover any and every kind of damages given by the terms of the Employers' Liability Act — April 22nd 1908, without any more specific allegation as to any loss or damage occasioned by the negligence that resulted in the injury and death of the deceased.

XVI.

The declaration in this case meets in its allegations every requirement of said Statute — April 22nd 1908, and any damage allowed thereunder is recoverable under it as framed. It was therefore error in the Trial Judge to instruct a verdict for the defendant in error, and error in said Court of Appeals to affirm said action.

XVII.

The evidence in the case was undisputed that the deceased was twenty-four years of age, with a life expectancy (39½) thirty-nine and one-half years, a young man of fine character, strong, vigorous

and industrious, well educated, and a very capable man in
126 everything he had undertaken; especially skillful as to machinery of all kinds, and capable as a farmer and manager of a large farm and farming operations. On motion by defendant, all this evidence was excluded by the Trial Judge as incompetent and irrelevant on the question of damages recoverable under said Statute of April 22nd 1908, after the same had been permitted to go to the jury. This was done solely upon the theory that plaintiff in this action could not recover anything save any pecuniary loss the parents in this case may have sustained from the death of their son. This action of the Trial Judge as to all such evidence was sustained by the said Court of Appeals. The action of both said Courts is here assigned as error.

Whereas, because and on account of each and all of the foregoing errors assigned, plaintiff and appellant prays and asks that the judgment and rulings of said Court of Civil Appeals be held to be error, and that the case can be reversed.

H. N. LEECH,
Attorney for Plaintiff and Appellant in Error.

127 And afterwards towit on September 27, 1912, a bond was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Know All Men By These Presents, That we, C. W. Garrett, Administrator of T. W. Lewis, Jr., deceased, as principal, and H. N. Leech, as sureties, are held and firmly bound unto the Louisville & Nashville Railroad Company in the full and just sum of Five Hundred ($500.00) dollars, to be paid to the said Louisville & Nashville Railroad Company, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our heals and dated this 24th day of September in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said Court, between C. W. Garrett, as Administrator of T. W. Lewis, Jr.,
128 deceased, Plaintiff in Error and the Louisville & Nashville Railroad Company, Defendant in Error, a judgment was rendered against the said C. W. Garrett, as Administrator of T. W. Lewis, Jr., deceased, and the said C. W. Garrett, as Administrator of T. W. Lewis, Jr., deceased, having obtained an allowance of writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment in the aforesaid suit:

Now, The Condition Of The Above Obligation Is Such, That if the said C. W. Garrett, as Administrator of T. W. Lewis, Jr., deceased, shall prosecute said writ of error to effect, and answer all

damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

C. W. GARRETT, *Adm., &c.*, [SEAL.]
By H. N. LEECH, *Att'y.*
H. N. LEECH. [SEAL.]

Sealed and delivered in the presence of
JNO. T. CUNNINGHAM.
DANNY FORD.

Approved by
LOYAL E. KNAPPEN,
United States Circuit Judge.

129 United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, H. N. Leech, a resident of said district, do solemnly swear, that after paying my just debts and liabilities I am worth twenty-five thousand dollars, in real estate within the jurisdiction of this court, and subject to execution, levy and sale.

H. N. LEECH.

Sworn to and subscribed before me this 24th day of September A. D. 1912.

[SEAL.] Q. C. ATKINSON,
Clerk & Master of Chancery Court of Montgomery Co., Tennessee.

And afterwards towit on October 11, 1912, waiver of service of citation was filed which reads and is as follows:

In the United States Circuit Court of Appeals for the Sixth Circuit.

#2208.

C. W. GARRETT, Administrator of T. W. Lewis, Jr., Plaintiff in Error,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant in Error.

130 In this case comes the Louisville & Nashville Railroad Company by its attorney of record Jno. B. Keeble and waives service of the citation on writ of error to the Supreme Court of the United States.

LOUISVILLE & NASHVILLE R. R. CO.,
By JNO. B. KEEBLE, *Attorney.*

131 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between C. W. Garrett, Administrator of T. W. Lewis, Jr., Plaintiff in Error and The Louisville & Nashville Railroad Company, Defendant in Error, on writ of error to the Circuit Court of the United States for the Middle District of Tennessee, a manifest error hath happened, to the great damage of the said C. W. Garrett, Administrator of T. W. Lewis, Jr., as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 28th day of October, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk Circuit Court of Appeals for the Sixth Circuit.

LOYAL E. KNAPPEN,
United States Circuit Judge for the Sixth Judicial Circuit.

132 [Endorsed:] The Supreme Court of the United States. C. W. Garrett, Adm., Plaintiff in Error, vs. Louisville & Nashville Railroad Company, Defendant in Error. Writ of Error. Filed Oct. 30, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

In pursuance of the command of the within writ of error, I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby transmit under the seal of said Court, a true, full and complete copy of the record and proceedings in said Court in said cause and matter in said writ of error stated; together with all things concerning the same, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court at Cincinnati, Ohio, in said Circuit, this 15th day of November, 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

133 UNITED STATES OF AMERICA, *ss:*

To the Louisville & Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein C. W. Garrett, as administrator of T. W. Lewis, Jr., deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at Grand Rapids, in the Sixth Circuit this thirty first day of October, in the year of our Lord one thousand nine hundred and twelve.

LOYAL E. KNAPPEN,
Judge of the United States Circuit Court of Appeals for the Sixth Circuit.

134 [Endorsed:] I accept service of the within citation in behalf of the Louisville & Nashville R. R. Co. this 2nd day of November, 1912. Jno. B. Keeble, Att'y.

135 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the writ of error and citation in the case of C. W. Garrett, Adm. of J. T. Lewis, Jr., vs. Louisville & Nashville Railroad Co. No. 2208, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 15th day of November A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 23,471. U. S. Circuit Court Appeals, 6th Circuit. Term No. 404. C. W. Garrett, administrator of T. W. Lewis, Jr., deceased, plaintiff in error, vs. The Louisville & Nashville Railroad Company. Filed December 23d, 1912. File No. 23,471.

Supreme Court of the United States

October Term, 1913.

No. 81.

C. W. Garrett, Administrator of T. W. Lewis, Jr., Deceased,
Plaintiff in Error,

vs.

The Louisville & Nashville Railroad Company.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

H. N. LEECH, Attorney
For Plaintiff in Error.

MS GOWAT MERCER JACKSON TENN

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 404.

C. W. GARRETT, ADMR. & C.

vs.

LOUISVILLE & NASHVILLE RAILROAD CO.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This suit was filed in a State Circuit Court of Tennessee, March 21st, 1910. It was removed into the United States Circuit Court at Nashville, Tennessee. The declaration is set out on pages 2-6, Transcript, and contains three counts. The suit is filed in the name of the Administrator of T. W. Lewis, Jr. It will be sufficient to set out the first count, herein, and note any differences in it and the other two.

The plaintiff is a citizen of the State of Kentucky, and is the administrator of T. W. Lewis, Jr., by appointment of the County Court of Stewart County, Tenn.

That said defendant was at the time of his death twenty-four years of age, a strong and vigorous young man of fine business qualifications and earning capacity, and left surviving him T. W. Lewis, his

father, and Mrs. T. W. Lewis, his mother, and who still survive him;

That on and prior to September 27, 1909, said defendant railroad company was, under a charter granted by the State of Kentucky, a common carrier by railroad engaged in commerce between the States of Kentucky and Tennessee and other states, and that on said date was running two of its freight trains in the carrying on of commerce between Kentucky and Tennessee, between Bowling Green, in Kentucky, and Paris, in Tennessee, and on the said freight train running from Bowling Green to Paris on the date named plaintiff's intestate was employed as a brakeman, being the front brakeman;

That the train dispatcher's office, controlling the movements of defendant's trains on its line of road between said two points, in said states, was located at Paris, in Tennessee; that on the date named the dispatcher at Paris wired to the telegraph operator or office at Stewart, Tenn., a station on said line of railroad between the said two points, an order for the said train going south, and on which said decedent was a brakeman at the time, that the train going north from Paris to Bowling Green at that time would wait for the train going south until a given time, 12:40 a. m., or thereabouts, the said train going north having the right of way on the main line as against said train going south, at Big Sandy, a station south of Stewart, on said line of railroad, and gave the same order at Paris to the engineer and conductor of the train going north; that this order was received, as sent, at Stewart, by the operator at that point and delivered to the engineer and the conductor of said train going south;

That after said order was received, as stated, the dispatcher changed the meeting and passing place of

the said two trains from Big Sandy to Faxon, a station about five miles north of Big Sandy, and wired an order to this effect to the operator at Paris and to the one at Stewart, a station north of Faxon on said line, stating that the train going north would wait at Faxon until a given time—naming the exact time—for the train going south;

That this order was received by the telegraph operator at Paris, and correctly delivered to and received by the conductor and engineer of the train going north, but through negligence the telegraph operator at Stewart did not deliver this order changing the place of meeting and passing of the trains to either the conductor or engineer of the train going south, as it had been sent to and given to him by the train dispatcher at Paris, but did deliver it in such form and condition that it did not inform the engineer and conductor on said train going south that the former order had been revoked, and the meeting and the passing place changed from Big Sandy to Faxon;

That because of this negligence on the part of the said operator at Stewart, the engineer and conductor in charge of the train going south did not stop at Faxon, as it should have done under the order as sent by the train dispatcher to the operator at Stewart, for the north-bound train to pass it, but ran on until a collision of the said two trains occurred on the main line of defendant's railroad about one and a half miles north of Big Sandy;

That in this collision, in an effort to save his life by jumping from the window of the engine when it was soon that the collision was imminent, and without fault upon his part, plaintiff's intestate was caught under the engine as it fell over, the lower part of his body remaining under the engine some six hours or

more, during which time he remained conscious and suffered intense agony and pain from the weight of the engine and from hot water poured on him from the boiler, and died before the engine could be removed from off his body.

Wherefore, because of the said negligence, which was wilful and reckless, of the said defendant's officers, agents and employees causing said injuries and death, plaintiff, as administrator of the said intestate, sues the defendant, for the benefit of his parents, in the sum of fifty thousand dollars damages, and asks for a jury to try the case.

The second count is the same as the first save it avers the negligence of the operator at Stewart, mentioned in the first count, and negligence of the engineer and conductor in charge of the train on which deceased was a brakeman, in running it past Faxon, without waiting for the north-bound train,—the collision being the result of the negligence of all three of said employees of the defendant company.

The third count simply states the points in the two states to and from which the colliding trains were running, and the fact that the collision was due to the negligence of the operator at Stewart and the engineer and conductor in charge of the train on which deceased was a brakeman, in the respects as set out in the other two counts. It avers parents, brothers and sisters survived decedent. Plaintiff sues simply as administrator on the facts in this count.

The pleas were not guilty and contributory negligence of the deceased, in putting himself in an extra hazardous position and out of the line of his duties. Tr. 12.

It is not controverted that the deceased was killed at the time stated in the declaration by collision of trains, engaged in interstate commerce between Kentucky and Tennessee, by reason of the negligence of the telegraph operator at the station Stewart in not correctly taking from the train dispatcher at Paris, and delivering to the engineer and conductor in charge of the train on which deceased was a brakeman, an order changing the meeting place of the two trains from the station Faxon to Big Sandy. The first meeting point was Faxon, north of Big Sandy, and the collision took place between these two stations. It is manifest that the conductor and engineer were negligent in running the train on south after receiving orders from the telegraph operator at this station Stewart. The order they received from the operator referred to an order No. 40 as revoked,—a number they had not received. They asked the operator to find out what that order was, and he replied that the dispatcher said there was nothing more, and for them to go ahead. Tr. 26. However, it is not important to insist upon this negligence of the engineer and conductor.

The engine turned over and the deceased was caught under the boiler, from his hips down, and he remained there several hours. He died soon after being rescued from this position. Tr. 33 and 34, 39 and 40.

After proof by the witnesses Holley and Clark to the effect that the deceased was a young man of energy and vigor, and lived on his father's plantation, and worked for his father in looking after the farming operations, the handling of machinery, etc.,—Tr. 43-49,—and just before the introduction of the deceased father, Major T. W. Lewis, defendant, through attorney, thus addressed the Court:

"Mr. Keeble: Now, Your Honor, permit me just a moment: I do not like to annoy you on the points that were threshed out before, but I remember that we did have an objection to this class of evidence upon the two propositions, and I want to make the objection now, this objection, as to the earning capacity or earnings of this young man, as being irrelevant and incompetent to any issue in this case, for two reasons. As I understand the declaration, this is really a declaration that proceeds upon the idea that it was the cause of action of the deceased himself, and is based upon the pain and suffering and the general conditions of the accident, and is not a declaration shaped upon the theory of the second right of action given under the statute, that is to say, a declaration for the beneficiary; consequently, any evidence in this record as to the earning capacity or character of this young man would be incompetent from our point of view.

The second point of view, if I am mistaken about the first of defendant's propositions, and this is a suit for the benefit of the next of kin, then it becomes necessary for the declaration to allege some pecuniary loss on the part of the plaintiff in order to lay ground for evidence of that character.

The Court: I find that this declaration does not specifically aver that this suit is brought for the use of the beneficiary, the father and mother, neither is there any specific averment as to damages to the father and mother resulting from the death of the son. I have serious doubt whether, under that form of declaration, or whether in the present shape of the declaration, whether evidence such as that objected to which might throw light upon the question of damages to the beneficiary, is competent, but I haven't the opportunity now to examine the authorities on that question of pleading and to decide it definitely, without the investigation I would like to make. I find that plaintiff's counsel has an elaborate brief

which has been submitted, which goes fully into his theory of the case and which has evidently been prepared with a great deal of thought and thoroughness; so that, I do not want to definitely rule on the question in a manner which would be prejudicial to the plaintiff, if he is entitled to recover, otherwise than as it should be, and I have concluded to overrule the objection to the evidence for the present and to say that I will allow the plaintiff, if he so elects, to amend the declaration on its face so as to specifically aver that the suit is brought for the benefit of the father and mother and their use, and also to specifically aver damages resulting to them from the death. If the plaintiff elects to do that, to make that amendment, then the exception to this evidence will be definitely overruled. If the plaintiff does not elect to do so, before the conclusion of the testimony in the case, then the defendant may renew its motion to exclude this evidence and I will then rule on it finally." Tr. 49 and 50.

(It appears on pages 71 and 72, Tr., that the Court admits that he was in error in stating that the declaration does not appear to be brought for the benefit of the father and mother.)

After the foregoing, the father testified that his deceased son was twenty-four years of age, unmarried, well educated, and physically and morally a good specimen of youth; was of good business qualifications; that he was getting old and feeble, and that his son was of great help to him in the management of his large farming operations; that he was in fact, his manager, as to same; that he had only been running on the railroad about a month, and that when he left home he expected to return to the farm and continue there as he had been, and that he would be back to gather the corn; that he paid him no wages, but he got money whenever he wanted it; that he lived simply as

a member of the family and made himself useful in managing the plantation and looking after matters, and that he also grew crops for himself and did what he pleased with the money he made; that he had great aptitude for machinery and looked after such on the farm; that his son was the manager of the farm and that he relied upon him. Tr. 51-55.

In reference to this feature of the testimony, the opinion of the United States Circuit Court of Appeals from the Sixth Circuit, Tr. 88, says:

> "Thus, as respects damages, there was evidence tending to show: that the father was the owner of about 1,800 acres of land and the largest farmer in his neighborhood, raising corn, tobacco, wheat, hay, live stock, etc.; that he was seventy-one years of age and growing feeble; that he relied on deceased as the manager of this farm; that deceased was strong in physique and health, and well educated and possessed of good business qualifications and of aptitude for all kinds of machinery, including such as is used on a farm; that when he went away to engage in railroad work he stated that he would be back to gather the corn; that he was unmarried and lived with his father and mother as one of the family; that he raised crops of his own on the farm, and while he was not in receipt of fixed wages from his father, he was in the habit of receiving money from him when he desired it. It is safe to say that prima facie this presented a reasonable expectation of benefit from the continuance of the son's life, which, with proof of the value of such benefit, was susceptible of estimate of pecuniary loss to the father, as also to the mother, who was some eight years younger than the father; etc."

On the trial plaintiff asked the witness W. H. Binkley as to the suffering of the deceased, as follows: Tr. 34.

> "State whether he was suffering any or not?

A. Well, he didn't seem to be suffering a great deal. He said he wanted us to get him out from under there. He said he thought he was just laying under there. I thought he was, too, but when we went to dig him out I saw he was more than hung.

Q. What was his condition under there?

A. Burned and mashed by the heat of the boiler and weight.

Q. After you finally got him out, what indications of suffering did he show?

A. He showed a great deal of suffering, as soon as they began to raise the boiler off; after the wrecker got there, they set jacks under there and raised the boiler, and as soon as they began to relieve him of the weight he began to flounce around with his body, looked like he was in great agony. The doctor gave him some kind of dope, or something to relieve his pain.

Q. Gave him something?

A. He did; gave him something, yes; I don't know what it was."

On the same subject was the deposition of Dr. Cunningham, Tr. 38-40. The testimony of these two witnesses on this subject was on the motion, hereinafter to be referred to as having been made, at the conclusion of the testimony, ruled out as incompetent, under this declaration.

The deceased was in the cab of the engine when the collision took place, and the railroad company had a rule set out on pages 56 and 57, Tr., reading thus:

"The proper place for a freight train conductor while his train is in motion is in the cupola of the caboose, if it has one. If the caboose should not be provided with a cupola, he must maintain such other position either on top or inside as will give him full view of his train and enable him to see that his brakemen properly perform their duties and to know that the flag-

man goes out promptly when necessary to flag. He must also keep a sharp outlook when on curves. He should not ride on the engine except in case of emergency. When trains are descending grades or approaching and passing through station, flagmen and brakemen must be at their post on top of the train. Brakemen, when riding on the engine, must obey the enginemen's instructions."

Plaintiff introduced evidence to show that this rule had application to certain named grades on the line, and did not apply to the grade where this collision took place; that in point of fact, the rule was not enforced by the company, and it was a common thing, and well known to the officials of the company, and other employees in charge of trains, that brakemen rode on the engine whenever they saw fit, and that such was their habit. Binkley's testimony, Tr. 34 and 35; Gilson, Tr. 28 and 29.

The deceased's father was seventy years of age and his mother sixty-two at the time of his death. An insurance agent, Davis, stated, on his original examination for plaintiff, that deceased's expectancy was thirty-nine and one-half years, and on cross-examination, over the objection of plaintiff, he was permitted to state that the father, being seventy years of age, had an expectancy of about eight years, and the mother about five years.

When the proof was concluded, the following took place: Tr. 71-74.

"The Court: Has the plaintiff any proof in rebuttal?

Mr. Leech: I have no more proof.

The Court: You make your motion and state the grounds?

Mr. Keeble: Now, first, this declaration is a

declaration for the injury to the deceased person himself, and not for any damages to the next of kin, the father and mother, as provided by statute.

Second, there is no evidence of any pecuniary loss sustained by the beneficiaries, which is essential in a cause of action of this kind.

Third, that there is no allegation of any pecuniary loss in the declaration sustained by the beneficiaries.

Fourth, that when the deceased went in the engine at the time of descending the grade in question, it being uncontroverted in the evidence that it was his duty to be upon the top of the train, he assumed the risk of that position, notwithstanding the employers' liability act of 1908, and his administrator cannot recover, for the reason that an employe not only assumes the ordinary risks of the employment, but under the law he assumes the ordinary risks of any position he takes outside the scope of his employment when he is not required by the master to take a position of greater peril, or of peril.

We renew the motion and our objection to that evidence.

The Court: Mr. Leech, have you concluded to make that amendment?

Mr. Leech: As to the pleading, if the court please?

The Court: Yes, sir.

Mr. Leech: Now, let me see if I understand the court on that.

The Court: I give you leave to amend the declaration so as to show that it is brought for the benefit of the father and mother, and also so as to aver that they (the father and mother) suffered damage by his death.

Mr. Leech: Well, does Your Honor hold that this allegation does not show that it was for the benefit of the parents: 'Whereupon, because of the said negligence, which was gross, wilful and reckless, of the said defendant's officers, agents

and employes causing said injuries and death, plaintiff, as administrator of the said intestate, sues the defendant for the benefit of his said parents, in the sum of fifty thousand dollars damages, and asks for a jury to try his case.'

The Court: I didn't notice that phrase. I think that it is sufficient. I had overlooked that.

Mr. Leech: That is in every count.

The Court: Well, I think that would be sufficient to show that it was for the benefit of the father and mother. Now then, do you want to amend, on the question of pleading now, so as to aver that they suffered damages by his death?

Mr. Leech: Now, if the court please, I want to be perfectly frank in this matter. The declaration represents my conception of this case under the statute, and if to amend this declaration so as to allege that they suffered a certain pecuniary loss, I would have to specify what that pecuniary loss was; simply to show they suffered pecuniary loss would not be sufficient, would it?

The Court: I will not rule on it until you make some amendment. I do not think that would be proper.

Mr. Leech: Well, I do not want to amend so as to confine this suit to a claim under the statute simply for the loss of any pecuniary benefit or service.

The Court: In using the word 'pecuniary,' of course, I would understand it to be services of value that could be measured in money, that would have some money value.

Mr. Leech: In other words, that we could not recover for anything else except the value of this service.

The Court: What I mean is, the reasonable expectation of benefit to be measured in money by the continuance of the life. It might be in the form of money that he would earn and pay his parents, or leave his parents, or service that he would render them, or something of that sort.

Mr. Leech: Suppose he would die, would that feature of it come under that?

The Court: I don't undertake to answer all these questions, Mr. Leech. You know my views as expressed at the other trial. If you want to amend, I will allow you to amend.

Mr. Leech: Yes, but as I understand Your Honor's ruling before, and as I understand it now, by pecuniary value it meant simply the value of the services Mr. Lewis would have from his son.

The Court: The value of that he might reasonably expect to receive, either in money or other things, as distinguished from the value of the son's life itself. In other words, I am clear in the opinion that under the statute that there is no survival of the right of action for the death of the son as such. I have considered it very carefully, in connection with your former argument and other arguments I have heard, and I am still of the same opinion I was before on this subject. Now, if you want to amend your declaration so as to aver damages to the father and mother, you may have leave to do so. If you do not, I will rule on the motion to exclude the evidence, and then I will rule on the motion for peremptory instructions.

Mr. Leech: No, sir, if the court please, I am going to stand on my conception of this case.

The Court: Now to what extent is your motion to exclude the evidence, or your objection. What is your motion to exclude?

Mr. Keeble: My motion was to exclude all evidence of any pecuniary value of the life, in so far as his capacity to earn money, or loss that had been sustained, of his expectancy of age, any money, or pecuniary in character, or could be estimated in money.

The Court: Well, I sustain the motion and I exclude the evidence.

To the action of the court in excluding the evidence, plaintiff excepts.

Mr. Leech: Now in order that there may be—

Mr. Keeble: Your Honor, I think he has elected—

Mr. Leech: I am not going to change my election at all. I want to see the original declaration; I think I have got it in there. My copy shows it is in there. Now, I understand the motion is to take the case from the jury, if the court please.

The Court: I haven't yet done so. I have now sustained the motion to exclude the evidence looking to the earning capacity of the deceased, and the pecuniary benefits of service that might have been reasonably expected to be received by his parents from a continuance of his life. I sustain that motion, as a matter of pleading, on the ground that the declaration does not allege any special damages of that character, that makes evidence on those matters competent, and I do so especially on the authority of the case of *Thompson vs. Chicago R. R. Co.*, 104 Fed., 845, and the other cases cited in note 12, in 13 Cyc., p. 343, on the question of pleadings.

Mr. Leech: To this action plaintiff excepts.

The Court: Then, coming to the question of the motion for peremptory instructions, that leaves the case without any evidence whatever that the parents of the deceased boy had any reasonable expectation of pecuniary benefit or of receiving valuable services from him, capable of being estimated in money, or that they suffered any pecuniary losses or damages that could be estimated in money by reason of his death, and it leaves the case to rest solely upon the theory that the right of action for the death itself survives the right of action which the son himself would have had if he had lived. In my opinion, there is very clear, strong evidence of this young man under circumstances that would create a right of action of some character, under the employers' liability act, the act of Congress of April 22, 1908, provided that act, in the form in which it

was originally passed, had provided for the survival of the right of action. In other words, if this statute, gentlemen of the jury, were like the Tennessee statute, and allowed the jury to estimate the value of the life that was destroyed, then I think there would be a clear case to go to the jury. But, after careful consideration of this case, this being the second time I have had this case, I am of the opinion that the federal employers' liability act does not so provide, that it is not like the Tennessee statute in that respect, and that it for some reason failed to make any provision for the survival of the right of action in the case of death to any injured employe, and made no provision for the recovery for the value of a life, and that the only provision that it made in case of death was for a right of action for the beneficiaries who survive him, or for the damages that they suffered, what they lost by the life, not the value of the life, but what was the loss to them by the taking of the life? What would they reasonably have expected to have received from the dead person if he had lived. How much were they deprived of in a money sense or in any manner which could be estimated in money by his death. Since the act of 1908 was passed Congress has amended the employers' liability act so as to provide for the survival and so as to make a case which should go to the jury, if that amendment had been in force at the time this accident occurred. But, unfortunately for the plaintiff in this case, the accident occurred between the time of the original passage of the act and the time of the amendment, so that the amendment cannot apply; and under the original act there is no survival of the right of action for death, in my opinion—no right of action for the value of the life—and as the plaintiff has not seen fit to amend the declaration and to aver damages to the beneficiaries and there is no evidence of such damage now in the case, having been excluded because of the fact that there is no allegation in the declaration, and the plaintiff

rests his case on the other proposition of law. I sustain the motion for peremptory instructions, and direct you to return a verdict in favor of the defendant.

Mr. Leech: I wish to except.

The Court: You may note your exception.

Mr. Leech: To the action of the court in excluding the evidence on motion of defendant, as to the value of services—is that the motion, Mr. Keeble?

The Court: Well, to the extent they were excluded, you may just put it broadly.

Mr. Leech: For the value of services or pecuniary benefits to the parent, on the ground that there was no allegation in the pleadings upon which to base such proof, plaintiff excepts. To the entire action of the court upon said motion, plaintiff excepts.

And to the action of the court after said ruling, in taking the case from the jury—I mean, in instructing the jury to return a verdict for defendant, upon the motion for peremptory instructions, plaintiff excepts. I believe that covers it. To the entire action of the court upon motion for peremptory instructions, plaintiff excepts."

The opinion of the United States Circuit Court of Appeals, Sixth Circuit,—Tr. 90,—concludes thus:

"Ordinarily, it would result that the assignments should be overruled and the judgment affirmed. But we infer from the record that the opportunity given to amend was declined through counsel's misapprehension of the trial court's statement touching the effect of averment in relation to pecuniary benefits and damages. The order therefore is that the judgment will be reversed and a new trial awarded (without costs), unless plaintiff through his counsel shall, within sixty days after the entering of this judgment, cause written notice to be filed with the clerk of this court that further opportunity

to amend is declined; in that event the judgment will stand as affirmed with costs."

Within the sixty days thus allowed, on September 16th, 1912, plaintiff filed the following notice, declining the further opportunity to amend: Tr. 90.

"C. W. Garrett, Administrator of T. W. Lewis, Jr.,

vs.

Louisville & Nashville Railroad Company.

The judgment entered in this cause, July 17th, 1912, reversing it and remanding for a new trial unless plaintiff should within sixty days after the entering of said judgment, cause written notice to be filed with the Clerk of this Court that further opportunity to amend is declined, not being final so as to admit of a writ of error to carry the same to the Supreme Court of the United States under Sec. 241 'The Judicial Code,' the plaintiff below and appellant in this Court comes by his attorney of record H. N. Leech and declines to make any amendment to the declaration in order that the case may be taken by writ of error to the Supreme Court of the United States for the purposing of having construed the Act of Congress involved in this case approved April 22nd, 1908, known as the 'Employers' Liability Act.'

C. W. GARRETT, Admr., &c.,
By H. N. Leech, Att'y.
H. N. LEECH, *Att'y for Def't.*"

II.

ASSIGNMENTS OF ERROR RELIED ON IN THIS COURT.

TO THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

These assignments appear in the transcript, pages 92 to 96, seventeen in number.

Assignments number one and two insist that it was error to sustain the trial judge in his ruling out as incompetent under this declaration, the testimony of the witnesses Binkley and Dr. Cunningham, hereinbefore set out as to the pain and suffering, endured by the deceased.

The third assignment is that the testimony of the insurance agent Davis, showing the expectancy of the deceased's father and mother, was not competent in this case.

The remaining assignments of error may conveniently be treated as presenting the following propositions of law:

1st: It was error to sustain the trial judge in granting the motion for peremptory instructions, based upon the contentions that the declaration in this case was not to recover any damage to the next of kin, the father and mother, provided by the Act of April 22nd, 1908, but was one for the injury to the deceased person himself; that there was no evidence of any pecuniary loss sustained by said beneficiaries; that there was no allegation of any pecuniary loss sustained by them; that there could be no recovery because the deceased at the time of the collision was in a position,—

that is in the cab of the engine,—outside the scope of his employment.

2nd: That it was error to sustain the trial judge in holding that under this declaration damages could not be recovered for the death, or pecuniary loss of the deceased, that is, for the pecuniary value of his life,—or for his mental and physical suffering.

3rd: That it was error to hold that under the said statute of April 22nd, 1908, there could be no recovery for the pecuniary value of the life of the deceased, to be determined by the jury from a consideration of his age, his life expectancy, physical strength, health, earning capacity, etc.; and was error to hold that under said statute there could be no recovery for the pain and suffering endured by the deceased.

4th: That it was error to hold that under said statute of April 22nd, 1908, the measure of damages recoverable is confined to compensating the beneficiaries named in said statute,—the father and mother in this case,—to such actual pecuniary loss as may result to them, and that in this case there could be recovery for the actual pecuniary loss sustained by the father and mother.

5th: That it was error to hold that under this declaration, as framed, there could not be a recovery for the benefit of the father and mother for such actual pecuniary loss, as distinguished from the value of the life of the deceased, as they may have suffered by reason of his death.

6th: That it was error to sustain the trial judge in ruling that there could be no recovery for any pecuniary loss resulting to the father and mother in this case by reason of any reasonable expectation of pecu-

niary benefits they had in the life of the deceased, because of a failure of the declaration to aver such reasonable expectation of pecuniary benefit and what such were.

BRIEF AND ARGUMENT.

I.

CONSIDERATION OF ACT APRIL 22ND, 1908, ENTITLED: "AN ACT RELATING TO THE LIABILITY OF COMMON CARRIERS BY RAILROAD TO THEIR EMPLOYEES IN CERTAIN CASES."

When this case was disposed of in the United States Circuit Court of Appeals, there had been two cases,—neither of final authority,—*Fulgham vs. Midland Valley R. R. Co.*, 167 Fed., 660, and *Walsh vs. N. Y. &c. R. R. Co.*, 173 Fed., 495, simply holding that this statute created two distinct causes of action, one for the damages to the injured employee, and the other for the beneficiaries named in the statute. It was held that the action given the employee did not survive to the personal representative, and that therefore there could be no recovery in an action by the personal representative for the pain and suffering, etc., for which the employee himself could have recovered, had he lived.

In 227 U. S., page 59, is reported the case of *M. C. R. R. Co. vs. Vreeland*, decided January 20th, 1913, after this case had been decided in the U. S. C. C. Appeals, July 17th, 1912. While the only point really involved in this Vreeland case was whether the loss of society or companionship of the widow's husband, could be considered by the jury as an element of damages in an action by the personal representative under this statute, the opinion at length treats of this Act on

the subject of whether it gives two distinct and independent actions and the measure or elements of damages recoverable thereunder. Its position is that it declares the liability of the carrier to the injured servant, and therefore gives him a distinct and separate action to recover damages for his expense, loss of time, suffering and diminished earning power. It then reaches the conclusion that there being no express language, surviving or transferring this action to the personal representative, the action given the latter is distinct therefrom and cannot embrace or cover the character of damages covered by it. It further classes this statute as of the same character as the first English statute known as "Lord Campbell's Act," insofar as it provides for certain members of the family of the deceased employee. The argument seems to be that as this and similar statutes have been held as not surviving the right of action in the employee to his personal representative, it necessarily results that the character of damage that the personal representative might recover under the English statute and those modeled therefrom, must be held to be the only damages recoverable under this statute prior to the amendment thereto made April 5th, 1910. This character of damage, is said to be "the pecuniary damage resulting to them and for that only." It is stated that the sole test is not any legal liability of the injured person to the beneficiary; that, however, there must "appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

In the case of *Am. R. R. Co. vs. Didrickson*, 227 U. S., 145, this Vreeland case is referred to as to the scope of compensation recoverable under the statute, but the sole question in this case was whether the loss

of the society or the companionship of the deceased son was an element of damages under the statute.

In the case of *G. C. &c. R. R. vs. McGinnis,* 228 U. S., 173, the decedent left a widow and four children, one of the children being a married woman, residing with and maintained by her husband. The opinion states there was neither allegation nor evidence that she was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life.

This is the first case,—having been decided April 7th, 1913,—in which it can be claimed that it has been held that the statute does not provide for damages recoverable by the personal representative save and only where the beneficiaries named in the statute have suffered some pecuniary or financial loss.

If the interpretation of this statute is to be that only a beneficiary who has either a legal claim to support, or has in fact, because of the course of his conduct while living, received benefits from the deceased that might have been reasonably expected to continue, had he lived, then the amendment of April 5th, 1910, has added but very little to the effectiveness of the statute as originally enacted. Section 9 of said amendment reads thus:

> "That any right of action given by this Act to a person shall survive to his or her personal representative, for the benefit of the surviving widow, or husband, and children of such employee, and if none, then of such employee's parents; and, if none, then the next of kin, dependent upon such employee, but in such cases, there shall be only one recovery for the same injury."

Save as to damages that the employee might himself recover, if living, the personal representative can still only recover for the beneficiaries named, such damages as could have been recovered in such action before said amendment. If death is instantaneous, there is no recovery for any damages under the action now made to survive the deceased employee. The cases would be few where the elements of damage for which the deceased could have recovered, had he lived, would amount to much. If only such damages be recoverable by the beneficiaries as may depend upon a given pecuniary, or financial loss suffered by cutting off the life of the employee, as distinguished from damages for the pecuniary value of the life of the employee, the death of many employees will result in no legal damages. Many employees are of age, unmarried, and have no parent dependent upon them for support, or who have any reasonable expectation of a pecuniary interest in the continuation of their lives in the sense of such statutes as the English statute, before mentioned, and the statutes of American States patterned after it.

If this statute is to be given such narrow construction as to damages recoverable when death occurs, the result is Congress has not in fact regulated the relation of the employee to the employer, in the matter of interstate commerce,—it has only regulated it in such instances where the dead employee happened to have parents who suffered some actual financial loss, or reasonable expectation of pecuniary aid or support, dependent upon the continuation of the life.

This Act of Congress is not to be interpreted by any supposed analogy or likeness between the English statute and statutes from States in this country copied in substance and meaning therefrom. Lord

Campbell's Act has a title reading thus: "An Act for the compensation of families of persons killed by accident." The frame work of this statute and of all like statutes is one section providing that if the wrongful act, neglect, default, violence, etc., that resulted in death, was one for which the deceased could have recovered damages, had he lived, his administrator may, for certain beneficiaries named as composing his family,—broadened in some States to next of kin beyond the immediate family,—and a second section providing for damages, and for whose benefit, etc. This second section in the English statute reads thus:

> "And in every action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered * * shall be divided amongst the aforementioned parties, and in such shares as the jury by their verdict may find and direct."

The language of the title to this Act and the provision that the jury shall apportion the damages recovered amongst the named beneficiaries, or members of the family, in such shares as the jury may find and direct, make manifest that the sole purpose of this statute was to compensate the members of the family for the loss of a reasonable expectation of a pecuniary aid or support by the cutting off of the life of the decedent.

The New York statute passed in 1847, one year after this English statute, has for its title this language: "An Act requiring compensation for causing death by wrongful act, neglect, or default." The recovery is for the exclusive benefit of the widow and next of kin, and the jury is to distribute it as in the English statute. On this subject it reads:

> "And in every such action, the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the widow and next of kin of said deceased person."

In the features of the English and New York statutes thus noted, the statutes of Illinois, Michigan and Mississippi are copies.

Indiana has a statute,—page 309 Revised Statutes, 1876,—that reads thus:

> "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor, if the former might have maintained an action had he lived, against the latter for any injury for the same act or omission. The action must commence within two years. The damages cannot exceed $5,000, and must enure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property."

There is nothing in this language like that in the English and New York statutes as to the jury determining the shares of the beneficiaries in the recovery, —but the courts of that State have given it the same construction. But for such view of it by the Supreme Court of the State, very few would think that this language restricted the damages to the pecuniary loss suffered by the widow or next of kin, for whose benefit the action was brought. This Court in 152 U. S., page 243, sets out the language of Judge Wood as to the meaning of this statute on this subject, and it appears therefrom that before such ruling of the State Supreme Court, his view of the statute was that it was not so restricted.

It is manifest that the type of statutes just considered, has been interpreted as to this measure of damages solely from the purpose of the act as stated in the title, and from the fact that the damages is to be given by the jury to the respective beneficiaries in shares proportioned to the actual pecuniary loss suffered by them.

There is another class of State statutes in which this feature of the jury awarding the damages in shares, or proportions, does not appear, and in all such statutes the ruling is that the damage is not restricted to the loss or pecuniary interest the beneficiaries have suffered because of the death of the decedent.

In a Virginia case, *Matthews vs. Warner,* 26 Am. Rpt., 399, decided in 1877, the language of the statute on the subject of damages was this: "The jury in any such action may award such damages as it may deem fair and just." This case shows that the statutes of Kentucky, Iowa, Connecticut and California, were likewise construed.

A California statute reads thus: "The jury shall assess damages they believe to be just and take into consideration aggravating and mitigating circumstances." This language does not restrict the recovery to pecuniary loss or interest of the character meant by the English and American State statutes, drawn therefrom. 42 California, 215, *Meyer vs. San Fr.*

A like construction is given to the Missouri statute that reads thus: "Such damages as they may deem fair and just to the parties entitled to sue." 119 Mo., 235, *Heahl vs. R. R. Co.*

A West Virginia statute read thus:

> "In every such action, the jury may give such damages as they shall deem fair and just, not exceeding $10,000.00, and the amount so recovered shall not be subject to any debts or liabilities of the deceased."

In 174 Federal, 602, *C. & O. R. R. vs. Hackins*, the C. C. A., 4th Circuit, the opinion states:

> "The court of last resort of West Virginia has several times held that the plain meaning of the statute is to leave to the jury the determination of the amount of damages within the $10,000.00 limit, and the distinction is drawn between the phraseology employed and that of the English statute and the statutes of many other States, making the measure a pecuniary injury resulting from such death."

The South Carolina statute as to the beneficiaries is very much like this Act of Congress. The action is for the benefit of the wife, or husband and child, or children; if none, for the parents; if none, for the heirs at law or distributees dependent upon the deceased for support. On the subject of damages it reads:

> "The jury may give such damages, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, wilfulness, or malice, as they may think proportioned to the injury resulting from such death to the parties respectively," etc.

In 58 So. Car., page 70, *Mason, Admr. vs. So. Ry. Co.*, this language is used:

> "Again it will be noted that our statute, unlike many others of a similar character, does not speak of a pecuniary loss or injury, which might possibly tend to show that the injury for which

damages are allowed was confined to the deprivation of some legal claim, susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they may think proportioned to the injury resulting from said death."

We think it quite clear that in all the statutes in this country where the language on the subject of damages is broader than that of the English and New York and like statutes, the ruling has been that the jury is not confined to pecuniary or financial loss, in the sense of those statutes, suffered by the named beneficiaries,—but that the jury may give damages for the pecuniary value of the life of the deceased, to be ascertained by his age, health, earning capacity, expectancy, etc.

As to the right to recover under this statute for the pecuniary value of the life of the deceased, we think this was settled in 1866 in the case of *R. R. Co. vs. Baron*, 5 Wallace, 90,—which case we do not see referred to in the opinions in the cases where the Act of Congress, under consideration, has been before this Court.

The deceased was a bachelor, thirty-five years old, with an estate of $35,000.00, which he left his father by will, and he had an earning capacity of three thousand dollars per year. His father and brothers and sisters were his next of kin, for whose benefit his executor sued. They suffered no pecuniary or financial loss, legal or actual, by his death. They were simply his next of kin under the statute, and the verdict was for the pecuniary value of his life. The statute of Illinois on which the suit was based, provided in the first section that if the death of a person shall be caused by wrongful act, neglect, default, etc., of any

person, company, or corporation, such person, company, or corporation, should be liable to an action for damages in every such case where the person himself would have had a right to sue if death had not ensued. The second section read thus:

> "That every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law, in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars."

It is apparent that "pecuniary injuries resulting from such death" were construed to be the pecuniary value of the life of the deceased, and were not restricted to mean loss of some reasonable expectation of pecuniary aid or support. The fact that it was not given to the jury to allot the recovery in shares on the basis of such actual pecuniary aid suffered, forbade any such narrow view of the statute. The Act of Congress in question gives no duty or authority on the part of the jury to divide out in unequal portions a recovery between the widow and children, and if none such, to the parents. The recovery is one whole thing for the benefit of the named beneficiaries,—it is not to be divided into shares in proportion to the needs of the beneficiaries as the jury may find such needs.

The opinion speaks to the point that while the pecuniary injury, as construed by the Court, is uncer-

tain and indefinite, just as it is in cases of damages for pain, suffering, etc., and says:

> "But the statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the widow and next of kin in the proportion provided for in a distribution of personal property left by a person dying intestate. If the person had survived and recovered, he would have added so much to his personal estate, which the law on his death, if intestate, would have passed to his widow and next of kin; in case of his death by the injury, the equivalent is given by the statute in the name of his representative." Pages 105-6.

The opinion further reads, on page 106:

> "It has been suggested frequently in cases under these acts, for they are found in several of the States, and the suggetsion is very much urged in this case, that the widow and next of kin are not entitled to recover any damages unless it be shown they had a legal claim on the deceased, if he had survived, for support. The two sections of the act taken together clearly negative any such construction, as a suit is given against the wrong-doer in every case by the representative for the benefit of the widow and next of kin, where, if death had not ensued, the injured party could have maintained the suit. The only relation mentioned by the statute to the deceased essential to the maintenance of this suit, is that of the widow or next of kin; to say, they must have a claim on him for support, would be an interpolation in the statute changing the fair import of its terms, and hence not warranted. This construction, we believe, has been rejected by every court before which the question has been presented. These cases have frequently been before the courts of Illinois, and the exposition of the

act given by the learned Judge in the present case is substantially in conformity with those cases."

That the state Supreme Court now holds that collaterals, such as brother and sister, cannot, under this same statute, recover for the death of a brother of means, of large earning capacity from the mere fact of such relationship, and that they must show that in fact they were in the habit of receiving pecuniary aid or support from him, does not impair the force of this decision. It is to be looked at as if the Illinois statute were an Act of Congress construed by the Court in that case. That the Supreme Court of Illinois has so held recently as to brothers and sisters, see *Rhodes vs. C. & A. R. R.*, 227 Ills., 328. Other States hold differently from this late decision in that State on the same point. See note 11 L. R. A. (N. S.), 623. The reasoning of the court in the Baron case, stands unanswerable as a correct interpretation of the language of the statute in question, had it been an Act of Congress.

To interpolate into the first section of this Act of Congress April 22nd, 1908, that the surviving parents must have had either a legal claim, or a reasonable expectation of a pecuniary aid or support, from the unmarried son, killed while an employee, would be as much unwarranted by the terms of the statute as to have added such qualification as that suggested as to the legal claim to support in this Baron case.

In *Penn. R. R. vs. McCloskey*, 23 Penn., 526, the deceased, McCloskey, left two sisters, who had no claim on him for support, and no pecuniary, or financial interest lost by his death. Section 18, Statute April 5th, 1851, provided an action brought to recover damages for injuries to persons was not to

abate by the death of the plaintiff, but might be prosecuted by his personal representative; Section 19, that if no suit had been brought before the death, an action might be brought by the widow, and if no widow, the personal representative "may contain an action for recovery of damages for the death thus occasioned," for the next of kin. Held that the purpose of the statute was to prevent the loss of life, and not to discriminate between damages done to the deceased and damages to the next of kin; that to cover all the damages coming from the negligent act,—pain and suffering, etc., and the pecuniary value of the life,—effectively made the negligence responsible for the destruction of life. Speaking of the measure of damages for the loss of the life, the opinion says:

> "The damages must necessarily be measured by the value of the life lost, and not by the pecuniary loss which the representatives shall have thereby sustained. The sanction of the law lies in the duty of compensation for the value of the life destroyed, measured according to its own merits, and not according to the necessities of the kindred."

This Act of Congress should be construed in the light of its own language, and the purpose of its enactment. Congress did not have in mind the changing of any common law principle as the survival of an action for personal injuries. Its purpose was to exercise its legislative power under the commerce clause of the Constitution over the relation of employer and employee in interstate commerce. It is the same character of legislation as the Safety Appliance Acts,—the primary and controlling purpose of such legislation being to prevent the loss of life and the infliction of injuries, and its secondary purpose by means of such prevention, to bring about a better and more efficient

railroad service to the public. 196 U. S., Johnson's case, 17. The Safety Appliance Act has for its sanction or means of enforcement, both fines and damages. That statutes gives damages for a failure to have the required equipment, and does not in words, give an action for such failure. For such failure it is held that damages may be had for death or injury thereby occasioned, and so far as we understand it, it has never been suggested that the personal representative suing for such failure, could not recover damages for the mental and physical suffering, etc., for which the deceased would have recovered, and the value of the life lost. That all such damages can be recovered, we think to be clearly inferable from *Schlemmer vs. R. R. Co.*, 205 U. S., page 1; *Johnson vs. So. Pacif. Co.*, 196 U. S., page 1. This Employer's Liability Act has for its sanction or means of enforcement the recovery of damages. "Damages" is a generic term, and there is nothing in the wording of the statute that restricts its meaning to the recovery of anything short of the entire results occasioned by the negligent act of conduct for which a liability was created under the first section of the Act. It would be rather a strange result to restrict the language of the statute on the subject of damages where the terms of it create an express liability for damages to some particular and inadequate measure of damages, and at the same time to hold that a statute having the same purpose in view that simply enacts that certain equipments shall be used, gives a broader and fuller measure of damages on failure to have such equipment.

If this narrow construction of this Act be adhered to, it is still true, that despite the amendment April 5th, 1910, that the statute is entirely inadequate to serve the purpose for which enacted. Save as to such damages as the deceased might have recovered, had

he lived,—in many cases, practically nothing, as when he dies instantly or survives only a few minutes,—the personal representative is still limited solely to a recovery of such pecuniary, or financial loss as the surviving parents may have in fact suffered because of the death of the deceased son,—in many instances nothing.

Looking to the wording of the statute itself, it simply creates a liability in damages wherever death, or an injury short of death results in whole or part, from the negligence of a carrier because of any defect, etc., in its cars, engine, etc. Of course, if the employee does not die, he necessarily brings the suit; if he dies, his personal representative must necessarily bring it. The language in the section is that such carrier as the Act speaks of, that is engaged in interstate commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent on such employe, for said injury or death resulting in whole or part from the negligence of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, road bed, works, boats, wharves, or other equipment."

There is no thought or indication that in case of the death of the employee the personal representative is only to recover either for the pecuniary value of the life, or for any financial or pecuniary aid or interest the beneficiaries, or parents, were deprived of by the ending of the life. The statute simply means that *when* death results the personal representatives are to

sue for the entire result or damages brought about by the negligence of the carrier. There is nothing of the frame work, or purpose of such Acts as Lord Campbell's Act, apparent or indicated by this first section. The plain and obvious meaning of it is, and to give it such makes the statute effective for the purpose for which enacted, that whatever damage results from such negligence of the common carrier, is a liability against it whether death does, or does not result. The words "for such injury, or death resulting in whole or part," etc., make this clear. This is but to say damages for the injury, or for the death, that is, the pecuniary value of the life lost,—pain and suffering endured before actual death, necessarily being a part of the pecuniary damages for the life lost,—may be recovered, whenever and in whatever way the suit may be brought.

Section four makes even clearer that the action is "to recover damages for injury to, or the death of, any of its employees," etc. If there is any room for any very nice discrimination on the point that if death results, damages for pain and suffering are not to be recovered by the personal representative, there is certainly no reason for holding that the personal representative shall recover solely some little financial loss or pecuniary interest the parents have lost by the death of an unmarried son. Both Sections 1 and 4 clearly speak of the right to recover damages for the injuries to, or for the death of, the employee. For the death of the employee can mean nothing short of a recovery for the pecuniary value of the life of the employee, to be ascertained by the jury from the evidence as to his age, capacity, expectancy, etc. We insist that in view of the purpose of this enactment, and of its having nothing in common with such act as Lord Campbell's Act, and the broad language not restrict-

ing damages as such statutes do, that the obvious meaning of the statute is that the personal representatives may recover damages of every kind that resulted from the negligence that is the basis of the liability under the first section of the Act.

The very words of the statute on the subject of next of kin, when there are no parents, is opposed to the interpretation that annexes as a condition to any recovery for the benefit of the parents that they must have some pecuniary benefit or financial loss of which the death of the son deprives them. The words "next of kin dependent upon such employee" carry the irresistible inference that such next of kin must have some actual financial dependence or claim for aid or support on the deceased that would probably have been continued had he lived. That such pecuniary expectation of aid or support is a condition precedent to a right of recovery for such next of kin, is conclusive that it is not such condition to the right of recovery in the personal representative for the benefit of the parents when the deceased left no widow or children. Any other interpretation of this portion of the statute gives no effect whatever to the words, "then of the next of kin dependent upon such employee."

Should an employee die after suit filed in his name, under this statute, there is no reason why the case might not be revived in the name of the personal representative under Section 955, U. S. Rev. Sts., and every character of damage recovered in such action.

Section 9 of the amendment April 5th, 1910, really in fact added nothing to the statute as originally enacted. It is simply affirmative and declaratory, and in the one respect to which it is confined, may be

treated as construing and applying the original Act. It was no more necessary than was the amendment in the Johnson case, 196 U. S., 1, declaring a locomotive engine to be a car used in moving interstate traffic.

SUFFICIENCY OF THE DECLARATION TO PERMIT THE EVIDENCE EXCLUDED BY THE TRIAL JUDGE ON THE SUBJECT OF DAMAGES.

Whether it be held finally that the measure of damages in this case is whatever pecuniary interest the parents as a reasonable expectation had from the continuance of the life of the deceased son, or whether recovery can be had for all damages, including pain and suffering and the pecuniary value of the life of the son itself, or for the pecuniary value of the life itself, measured on its own merits, the declaration as framed was sufficient to permit the jury to consider the evidence upon the subject of damages, heretofore set out as having been excluded by the trial judge. In support of this:

> "Under statutes giving the damages recovered to the next of kin of the deceased it has been held that it is not necessary that the declaration or complaint should contain a special allegation showing the manner in which the next of kin had sustained pecuniary loss, the intention of the statute clearly being not to limit the damages to those persons who sustained loss." 13 Vo. Cyc., 344.

The Baron case, 5 Wallace, 90; 45 Federal Rpt., *Severns vs. N. Railway Co.*, 407-409 and 10; 119 Fed. Rpt., 400; 120 Fed. Rept., 523. The Baron case is conclusive that this declaration is sufficient to permit proof of whatever damages the statute authorizes. The declaration in that case was like this,—its sufficiency was necessarily involved. It was insisted no

recovery could be had because of no financial interest or loss suffered by those for whom the suit was brought,—no legal claim for aid or support from the deceased. If the declaration had not alleged everything necessary, the opinion would not have held that the allegation of the relationship named in the statute, was all that was sufficient. In the 45 Fed. Rpt. case, *supra*, the writer of the opinion says: "I think the case of *R. R. Company vs. Baron*, 5 Wallace, 90, must be construed as settling this question, as far as the Federal Courts are concerned in the negative,"—holding a declaration like the one in this case sufficient.

AS TO ASSUMPTION OF RISK.

Deceased being on the cab of the engine was, of course, no assumption of risk that defeated the right of recovery under the declaration.

See note 28 L. R. A. (N. S.), 1215.

EVIDENCE AS TO THE EXPECTANCY OF THE PARENTS.

To permit the witness Davis to testify as to the expectancy of the parents in this case, was error. 208 Penn. Stat., *Emery vs. Philadelphia*, 492; 84 So. Car., *Trimmer vs. R. R. Co.*, 203; 42 S. W. Rept., *A. S. & W. Co. vs. Griffin*, 1034.

AS TO REMANDING CASE IN THE MANNER PERMITTED BY THE UNITED STATE CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Should the Court decline to reverse this case for the errors assigned, plaintiff in error respectfully requests that the same course be pursued as to the judgment of the trial judge as suggested in the opinion of the U. S. C. C. App., Sixth Circuit,—that it be remanded for a new trial before the court and jury, on the declaration being amended so as to specifically

allege the pecuniary expectation, or financial interest deceased's parents were deprived of, by the ending of his life,—the character of which is shown in the evidence of the father, hereinbefore set out, as to services in the way of benefit, etc., in his farming operations, and other services rendered for and in the interest of the parents.

However, it is respectfully insisted that the case should be reversed on the errors hereinbefore assigned.

Respectfully submitted,

C. W. GARRETT, Administrator, &c.,
H. N. LEECH,
Attorney for Plaintiff in Error.

John A. Pitts
of Counsel

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 81

C. W. Garrett,
Administrator of T. W. Lewis, Jr., Deceased,
Plaintiff in Error,

VS.

Louisville & Nashville Railroad Company,
Defendant in Error.

IN ERROR
To the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR DEFENDANT IN ERROR.

JOHN B. KEEBLE,
Attorney for Defendant in Error

BRANDON & BRUCE CO., NASHVILLE

INDEX.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 404.

G. W. GARRETT,

Administrator of T. W. Lewis, Jr., Deceased,

Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO.,

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

This is a suit brought by the Administrator of T. W. Lewis, Jr., to recover damages against the Louisville & Nashville Railroad Company, on account of the death of the said T. W. Lewis, Jr., which it was alleged resulted from the wrongful act of the Defendant railroad.

The suit was tried before the Hon. E. T. Sanford, Judge, etc., holding the Circuit Court of the United States at Nashville, Tennessee. In that Court, the trial Judge, after excluding certain evidence as to the mental and physical suffering of the deceased; and after excluding certain other evidence tending to show the pecuniary loss sustained by the beneficiaries of the action, peremptorily instructed the jury to return a verdict for the Defendant.

The Plaintiff sued out a Writ of Error from the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and the case was heard by that Court.

That Court made a most unusual order. After holding that there was no error committed by the trial Judge, the Opinion concluded as follows:

> "Ordinarily, it would result that the assignments should be overruled, and the judgment affirmed. But we infer from the record that the opportunity given to amend was declined through counsel's misapprehension of the trial Court's statements touching the effect of averment in relation to pecuniary benefits and damages. The order, therefore, is, that the judgment will be reversed and a new trial awarded (without costs), unless Plaintiff through his counsel shall, within sixty days after the entering of this judgment, cause written notice to be filed with the clerk of this Court that further opportunity to amend is declined; in that event, the judgment will stand as affirmed with costs."
>
> Transcript, page 90.

A decree in pursuance of this opinion was entered, as follows:

> "This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee, and was argued by Counsel.
>
> "On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of said Court in this cause be and the same is hereby reversed, and a new trial awarded (without costs), unless Plaintiff through his counsel shall within sixty

days after the entering of this judgment, cause written notice to be filed with the Clerk of this Court, that further opportunity to amend is declined; in that event, the judgment will stand as armed, with costs. The mandate will be withheld sixty days."

After this, the Plaintiff in Error filed a statement with the Clerk of the Court, declining to accept the terms of the Court, and the case was thereby affirmed.

Transcript, page 90.

After this, the case was brought to this Court by Writ of Error.

STATEMENT OF THE CASE.

The suit was based upon the Employers' Liability Act of 22nd of April, 1908. The deceased was twenty-four years old at the time of his death (Transcript, page 2), was unmarried, and left a father and mother surviving him, who, under the Act, were beneficiaries of the action.

Transcript, page 2.

After alleging the grounds of action, insofar as the wrongful act was concerned, the Plaintiff undertook to set out the damages sustained, and for whose benefit he sued, as follows:

"Plaintiff's intestate was caught under the engine as it fell over, the lower part of his body remaining under the engine some six hours or more, during which time he remained conscious and suffered intense agony and pain from the weight of the engine, and from hot water poured on him from the boiler,

and died before the engine could be removed from his body.

"Wherefore, because of the said negligence, which was willful and reckless, of the said Defendant's officers, agents, and employes, causing said injuries and death, Plaintiff, as administrator of the said intestate, sues the Defendant for the benefit of his parents, in the sum of fifty thousand dollars."

Transcript, page 3.

This was taken from the first count, but is to all intents the same as the allegations in reference to damages, etc., found in the second and third counts of the declaration.

From these excerpts it appears:

First. That the Plaintiff was seeking to recover damages on account of the mental and physical suffering of the deceased; and,

Second. That the declaration contained no averment of facts that tended to show that the father and mother had sustained any pecuniary loss on account of the death of the son.

While the case was being tried, objection was made to the evidence as to the pain and suffering of the deceased, and it was sustained and the evidence excluded.

Transcript, pages 34, 38 and 40.

Later on in the hearing, objection was made to evidence tending to show the pecuniary loss of the parents. This objection was as follows:

"Mr. Keeble: Now, Your Honor, permit me just a moment: I do not like to annoy you on points that were threshed out before, but I remember that we did have an objection to this class of evidence upon the two propositions, and I want to make the objection now; this objection, as to the earning capacity, or earnings of this young man, as being irrelevant and incompetent to any issue in this case, for two reasons. As I understand the declaration this is really a declaration that proceeds upon the idea that it was the cause of action of the deceased himself, and is based upon the pain and suffering and the general conditions of the accident, and is not a declaration shaped upon the theory of the second right of action given under the statute; that is to say, a declaration for the beneficiary; consequently, any evidence in this record as to the earning capacity or character of this young man would be incompetent from our point of view.

"The second point of view, if I am mistaken about the first of Defendant's propositions, and this is a suit for the benefit of the next of kin, then it becomes necessary for the declaration to allege some pecuniary loss on the part of the Plaintiff in order to lay ground for evidence of that character."

Transcript, pages 49 and 50.

Thereupon, the Court stated that he would not rule upon the question finally at that time; however, intimating that he thought the question well taken, and suggested to the Attorney for the Plaintiff that he might amend the declaration so as to specifically "aver damages resulting to them (parents) from the death."

Transcript, page 50.

The Attorney for the Plaintiff asked time to think about the proposition, and the Court granted him until the close of all the evidence to decide the proposition.

Transcript, page 50.

At the close of all the evidence, the objection to this evidence was renewed in behalf of the Defendant, and accompanying the objection was a motion that all such evidence be excluded.

Transcript, page 71.

Following this, the trial Judge inquired of Counsel for Plaintiff if he had concluded to amend his declaration as suggested. There followed this inquiry a most remarkable colloquy between the Court and counsel, as is found in the record at pages 71, 72 and 73, most, if not all, of which is set out in full in the Brief filed in this cause in behalf of the Plaintiff in Error.

The final result of this colloquy was that the counsel for the Plaintiff declined to amend his declaration, and the objection was sustained. The action of the Court excluded all evidence tending to show damages resulting to the parents of the deceased by reason of the death. As above appears, this action was based upon the proposition that there was no allegation in the declaration of any facts that, if proved, could be the basis of a presumption that any damages had resulted to the parents of the deceased man, which were recoverable under the Acts in question. This was given additional support by the refusal on the part of Counsel for the Plaintiff to amend his declaration in this particular.

The colloquy and subsequent election upon the part of the Counsel for the Plaintiff was, as it appears from his own statement, entirely deliberate, and based upon an intelligent appreciation of the issue. It also appears that his position was clearly taken in view of his theory as to the nature of the action, and as to the measure of damages.

His positions were two: First, That there was but one cause of action created by the Act—the cause of action of the deceased, which, in case of death, survived to the administrator for the benefit of the wife and next of kin; and, second, that in a suit brought by the administrator, damages recoverable embraced (a) damages for the mental and physical suffering of the deceased; and (b) that the compensation for the beneficiaries was the full money value of the life of the deceased, regardless of the dependence, or the reasonable expectation of aid (capable of being measured in money) on the part of the beneficiaries in case the deceased had continued to live.

As an illustration of this position on his part, we quote from the colloquy between the trial Judge and counsel. At one time he said:

> "The declaration represents my conception of this case under the statute."
>
> Transcript, page 72.

At another time he said:

> "I do not want to amend so as to confine this suit to a claim under the statute simply for the loss of any pecuniary benefit or service."
>
> Transcript, page 72.

In declining to amend, as again suggested by the United States Circuit Court of Appeals, counsel declares that he declines "to make any amendment to the declaration in order that the case may be taken to the Supreme Court of the United States for the purpose of having construed the Act of Congress involved in this case, approved April 22, 1908, known as the Employers' Liability Act."

Transcript, page 90.

This same proposition is repeated in the Brief filed in this Court.

On the side, then, it was insisted for the Plaintiff below: First, That the cause of action created by the Employers' Liability Act of 1908, created one cause of action, and not two, and that when the injured employe died as a result of his injury, this cause of action survived to the administrator for the benefit of the relatives named in the statute; second, that the administrator could recover such damages as the deceased sustained while living, including mental and physical suffering, and, also, compensatory damages based upon the value of the life of the deceased, regardless of the reasonable expectation of pecuniary benefits lost by the beneficiary.

On the other hand, it was insisted in behalf of the Defendant—

First. That the Act created two separate and distinct causes of action, namely, one in the injured employe himself, where death did not ensue; and one in the administrator of the injured employe when death did ensue.

Second. That the measure of the recovery in the actions falling in the second class was confined to the pecuniary loss sustained by the beneficiaries; and,

Third. That in a case like the instant case, where a man over twenty-one years was killed, a father and a mother to take under the statute it was essential to allege, as well as to prove such loss as the Act contemplated.

This latter view both the trial Judge and the Circuit Court of Appeals sustained, but only after suggesting to Counsel for Plaintiff to amend, and as it might be properly said, almost forcing it upon him. In fact anyone but a valorous heart would have yielded to these imprecations.

A CHANGE OF HEART AT LAST.

Although having stoutly refused in two Courts, yet we witness a change of heart at last. After forty pages of reassertion of his old position, counsel, in the last paragraph of his Brief, asks that if this Court thinks that his position has been wrong, that it reverse and remand the cause. Truly he evinces a correct picture of Bob Acres, whose valor came and went, for now counsel feels his going.

BRIEF AND ARGUMENT

The Act of Congress in question created two separate and distinct causes of action growing out of the wrongful act of the master—one in the injured employe himself, and one in the administrator where death resulted from

the wrongful act, to be prosecuted for the benefit of those named in the Act.

Michigan Central R. R. v. *Vreeland,* 227 U. S., 59.
American R. R. Co. v. *Didrickson,* 227 U. S., 145.
Fulgham v. *M. V. Ry. Co.,* 167 Fed. Rep., 660.
Northern Pacific Ry. Co. v. *Adams,* 116 Fed., 324.

As was said in Vreeland's case:

> "We think the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived, he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative?"

After an elaborate discussion, the Court said:

> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: 'Or in case of the death of such employe to his or her personal representatives for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death,' etc. There is no express or implied limitation of the liability to

> cases in which the death was instantaneous. This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for a loss and damage sustained by relatives dependent upon the decedent."

In such an action by the administrator the "damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe."

And this is true although "the pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

> *American R. R. Co.* v. *Didricksen, supra.*
> *Michigan Central R. R.* v. *Vreeland, supra.*
> *Gulf, Colorado, etc. Ry.* v. *McGinnis,* 228 U. S., 173.
> *North Carolina R. R. Co.* v. *Zachary,* 232 U. S., 248.

In a case where the law does not presume dependence and loss, there must be an allegation of such loss in the declaration as well as proof.

> *Gulf, Colorado, etc. R.* v. *McGinnis,* 228 U. S., 173.
> *North Carolina R. R. Co.* v. *Zachary,* 232 U. S., 248.

As was said in the case of

MICHIGAN CENTRAL R. R. *v.* VREELAND, *Supra.*

"But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction give, the jury were left to conjecture and speculation."

In the *McGinnis Case, supra*, the Court said, reversing the lower Court for holding that in such a case damages could be awarded for one of the children of the deceased:

"One of the surviving children was Mrs. Nellie Saunders, a married woman, residing with and maintained by her husband. There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. The Court was requested to instruct the jury that it could not find any damage in favor of Mrs. Saunders, but this it declined to do.

"The Court of Civil Appeals upheld this ruling, saying that 'the Federal Statute expressly authorizes the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' This construction of the character of the statutory liability imposed by the Act of Congress was erroneous. In a series of cases lately decided by this Court, the Act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must, therefore, be

limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss."

While these are perhaps the only cases decided by this Court, in which this precise question is raised and determined, the principle is well settled by many authorities and texts.

In those jurisdictions where the statute provides that the action shall be for the recovery of pecuniary loss only, it is essential in the declaration or complaint to allege that pecuniary loss has resulted from the death.

Encyclopedia of Pleading and Practice, Vol. 1, p. 874.

Cyc. Law and Procedure, Vol. 13, p. 343.

Howard v. *Delaware & Hudson Canal Co.*, 40 Fed., 195.

Thompson v. *Chicago R. Co.*, 104 Fed., 845.

Wiunt v. *International & G. N. Ry. Co.*, 74 Texas, 32, 11 S. W., 707.

Kearney Electric Co. v. *Laughlin*, 45 Neb., 638, 63 N. W., 941.

Orgall v. *Burlington & M. R. R. Co.*, 64 N. W., 450.

Hurst v. *Detroit City Ry. Co.*, 84 Mich., 539, 48 N. W., 44.

Regan, Adm'r. v. *C. M. & St. P. Ry.*, 8. N. W., 292.

In the case of

THOMPSON *v.* CHICAGO, M. & ST. P. RY. CO., *supra*,

the Court passed upon a question closely akin to the one at bar, holding that the cases cited by the Court "establishes the doctrine that the facts stated in the petition

must show that the next of kin were persons who were dependent upon the deceased for their maintenance and support, or that deceased was under a legal obligation to furnish such next of kin support and maintenance, and that the facts must support such allegations to entitle the party to recover under the general claim of damages."

In the case of

WINNT *v.* INTERNATIONAL & G. N. RY. CO., *supra*,

we have a case directly in point, where suit was brought by the parent on account of the death of a son over twenty-one years of age. There was no allegations authorizing recovery for damages resulting from death.

The Court held that this was necessary, drawing a distinction between a suit by a parent for injuries resulting in the death of a minor child, and that of an adult child. Referring finally to the suit brought by the parent on account of the death of an adult child, the Court held that it was necessary to show a reasonable expectation of benefit the parent would have received had the adult child not been killed, and finally said:

> "There are no allegations in the petition which would authorize any proof upon this point to support the claim for actual damages. The averments were that by his death so occasioned, she, as his sole surviving parent, had been damaged $10,000 actual damages. It did not follow that she had been so damaged by reason of death of her son, alleged to have been over twenty-one years of age, as a necessary legal consequence. In the absence of some averment

showing that he supported or contributed to her support, or that there was some expectation of benefit of a pecuniary character to be derived by the Plaintiff from the services of her son, there could be no presumption of law arising from the mere fact stated, that she had been damaged by the death of her adult son."

In the light of these authorities, we think both the trial Judge and the Circuit Court of Appeals of the United States, correctly ruled, insofar as the law applicable to this case is concerned, the conclusions from these authorities being—

1. That this cause of action was a cause of action in the administrator for the benefit of the dependent next of kind, separate and independent from the cause of action that the employe himself had arising out of the injury.

2. That this being so, the Plaintiff in this case could not recover for mental or physical suffering of the deceased.

3. That it was essential, in a case of this kind, where the deceased was more than twenty-one years of age, and the beneficiaries consisted of father and mother, for the declaration to contain an allegation of pecuniary loss, or loss susceptible of being estimated in money, and that there must be proof to sustain it.

If these propositions are correct, then it being uncontradicted that the declaration did not contain any such allegations, the trial Judge was correct in refusing to permit evidence of it, and the Circuit Court of Appeals was correct in affirming the judgment.

But Counsel for Plaintiff in Error, after renewing the arguments which he made in both Courts below, has relented. In the trial Court, although practically pleaded with by the trial Judge, that he should amend his declaration by alleging a loss on the part of the father and mother, declined to do so, for the reason, as appears more clearly from the excerpts from the colloquy, that he did not desire to in any way embarrass his proposition, which was to the effect that he was entitled to damages sustained by the deceased regardless of the dependence or expectation of pecuniary compensation on the part of the beneficiaries.

When the case was presented to the Circuit Court of Appeals for the Sixth Judicial Circuit, that Court, after having declared that the trial Court was not in error, gave evidence of the fact that there was yet another day of grace, by ordering the case remanded in order that counsel might still amend his declarations, unless counsel should, within sixty days, stipulate in writing, that he declined to do so. The reason of the Court's leniency on this subject was expressed in the Opinion, as follows:

> "We infer from the record, that the opportunity given to amend was declined through counsel's misapprehension of the trial Court's statements touching the effect of averment in relation to pecuniary benefits and damages."

Now, however, having declined the offer, twice, to amend his declaration, and having renewed the argument, and reasserted the positions taken in both Courts counsel concludes on page 40 of his Brief, that even though this Court should hold with the trial Judge and the United

States Circuit Court of Appeals as to the law applicable to this case and the rulings of the lower Courts upon the subject, nevertheless, that now the Court give him an opportunity to have the case remanded, in order that he may, at this late day, amend his declaration in accordance with the law, and try upon a theory which he had scouted and declined to accept in the two lower Courts.

This change of heart is doubtless due to the fact that all of the cases decided by this Court upon the question involved, have been decided since the trial of this case in the Court below and in the Circuit Court of Appeals.

We do not think it probable that this Court would tolerate such a trial of moot questions, simply to enable counsel to determine what was the best theory upon which he should rest his cause of action.

It might be that if he had never had the way pointed out by either one of the Courts below, that this Court might be lenient and merciful, and point the way for counsel. To remand this case now, however, would be merely to encourage the tenacious holding to theories at the expense of the time of the Courts, and to encourage the harassment of Defendants by experimental litigation.

For all of the above reasons we respectfully insist that this case should be affirmed.

John B. Knobb

Attorney for Defendant in Error.

GARRETT, ADMINISTRATOR OF LEWIS *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 81. Submitted November 12, 1914.—Decided November 30, 1914.

The Employers' Liability Act of 1908, prior to the amendment of April 5, 1910, declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury:

1. Liability to the injured employé for which he alone could recover;

2. In case of death, liability to his personal representative for the benefit of the surviving widow or husband and children, and if none, then of the parents, but only for pecuniary loss and damage resulting to them by reason of the death.

The declaration must contain an averment substantially of every fact necessary to be proved to sustain plaintiff's right of recovery in order to let in the proof; and every issue must be founded upon a certain point, so that parties may come prepared with their evidence and not be taken by surprise, and so that the jury may not be misled by introduction of various matters.

While the same precision is not required as in pleadings at law, a convenient degree of certainty must be adopted as to bills in equity so as to maintain plaintiff's case.

When proofs go to matters not set up in the bill, the court cannot act upon them as a ground for decision. They are not put in contestation by the pleadings.

Common experience may be taken as a guide in teaching that financial damage is not always a necessary consequence to the parent as the result of the death of an adult son; and if such damage is not pleaded proof cannot be offered in regard thereto.

Where plaintiff refused to amend after permission so as to allege pecuniary damage due to the death of his son, the court below committed no error in excluding evidence as to such damage and dismissing the complaint, and the judgment should be affirmed and the case will not be remanded for new trial on the declaration being amended.

197 Fed. Rep. 715, affirmed.

THE facts, which involve the construction of the Employers' Liability Act of 1908, and the right of parents to recover for death of an adult son, are stated in the opinion.

Mr. John A. Pitts and *Mr. H. N. Leech* for plaintiff in error:

The Employers' Liability Act should be construed in the light of its own language, and the purpose of its enactment. Congress did not have in mind the changing of any common-law principle as the survival of an action for personal injuries. Its purpose was to exercise its legislative power under the commerce clause of the Constitution over the relation of employer and employé in interstate commerce. It is the same character of legislation as the Safety Appliance Acts,—the primary and controlling purpose of such legislation being to prevent the loss of life and the infliction of injuries, and its secondary purpose by means of such prevention, to bring about a better and more efficient railroad service to the public.

The Safety Appliance Act has for its sanction or means of enforcement, both fines and damages. That statute gives damages for a failure to have the required equipment, and does not, in words, give an action for such failure. For such failure it is held that damages may be had for death or injury thereby occasioned. The

personal representative suing for such failure, could recover damages for the mental and physical suffering, etc., for which the deceased would have recovered, and the value of the life lost. The act has for its sanction or means of enforcement the recovery of damages.

"Damages" is a generic term, and there is nothing in the wording of the statute that restricts its meaning to the recovery of anything short of the entire results occasioned by the negligent act or conduct for which a liability was created under the first section of the act.

In support of these contentions see: *Am. R. R. Co.* v. *Didricksen*, 227 U. S. 145; *A. S. & W. Co.* v. *Griffin*, 42 S. W. Rep. 1034; *C. & O. R. R. Co.* v. *Haekins*, 174 Fed. Rep. 602; *Emery* v. *Philadelphia*, 208 Pa. St. 492; *Fulgham* v. *M. & V. R. R. Co.*, 167 Fed. Rep. 660; *G. C. & C. R. R.* v. *McGinnis*, 228 U. S. 173; *Heahl* v. *San Francisco*, 42 California, 215; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *M. C. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Matthews* v. *Warner*, 22 Am. Rep. 399; *Meyer* v. *San Francisco*, 42 California, 215; *Mason* v. *So. Ry. Co.*, 58 So. Car. 70; *Penna. R. R.* v. *McClosky*, 23 Pa. St. 526; *Railroad Co.* v. *Baron*, 5 Wallace, 90; *Rhodes* v. *C. & A. R. R.*, 227 Illinois, 328; *Schlemmer* v. *Railroad Co.*, 205 U. S. 1; *Severns* v. *Nor. Ry. Co.*, 45 Fed. Rep. 407; *Trimmer* v. *Railroad Co.*, 84 So. Car. 203; *Walsh* v. *N. Y. & C. R. R.*, 173 Fed. Rep. 495.

Mr. John B. Keeble for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This action for damages under the Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, was originally brought in the state court March 31, 1910. It was removed to the Circuit Court of the United States, Middle District of Tennessee, and tried there in May, 1911. The declaration contains three counts, each of which

alleges that plaintiff is the administrator of T. W. Lewis, Jr., by appointment of the County Court, Stewart County, Tennessee; defendant is a Kentucky railroad corporation engaged in interstate commerce; in September, 1909, the deceased was employed as a brakeman on one of its freight trains moving in such commerce; through negligence of its operatives and servants a collision occurred; in an effort to save his life he was caught under the engine and held there for six hours or more, suffering intense agony and pain, followed shortly by death; he was twenty-four years of age, strong, vigorous, with fine business qualifications and earning capacity. The first and second counts allege that the deceased left surviving T. W. Lewis, his father, and Mrs. T. W. Lewis, his mother, and that "plaintiff, as administrator of the said intestate, sues the defendant, for the benefit of his parents, in the sum of fifty thousand dollars damages." The third count alleges the survival of not only father and mother but also brothers and sisters (the names of the latter not being given), and that "plaintiff, as administrator of the said decedent, sues the defendant in the sum of fifty thousand dollars damages."

The trial judge, having definitely offered the plaintiff an opportunity to amend his declaration, which was declined, excluded all evidence relating to the mental and physical suffering of the deceased and also all tending to show pecuniary loss sustained by the parents; and then peremptorily instructed the jury to return a verdict for defendant. The United States Circuit Court of Appeals tendered a further opportunity to amend and when this was rejected affirmed the judgment of the trial court (197 Fed. Rep. 715). The cause is here upon writ of error.

The questions presented are: *First*, whether, under the Employers' Liability Act of 1908 (before amendment of April 5, 1910), the administrator of one who died of painful injuries suffered while employed in interstate commerce

by a railroad engaging therein can recover damages for the benefit of the estate (third count); and, *Second*, whether, if such administrator sue for the benefit of the employé's parents—there being no surviving widow or husband or child, it is necessary to allege facts or circumstances tending to show that as a result of the death they suffered *pecuniary* loss (first and second counts).

The nature of the rights and responsibilities arising out of this Act have been discussed and determined in four opinions announced by this court since the instant cause was decided by the Circuit Court of Appeals. *Michigan Central Railroad* v. *Vreeland*, 227 U. S. 59; *American Railroad of Porto Rico* v. *Didricksen*, 227 U. S. 145; *Gulf, Colorado &c. Ry.* v. *McGinnis*, 228 U. S. 173; *North Carolina Railroad* v. *Zachary*, 232 U. S. 248. It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employé for which he alone can recover; and (2), in case of death, liability to his personal representative "for the benefit of the surviving widow or husband and children," and if none then of the parents, which extends only to the *pecuniary* loss and damage resulting to them by reason of the death.

The third count of the declaration under consideration states no cause of action. The employé's right to recover for injuries did not survive him.

Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters. *Bank of the United States* v. *Smith*, 11 Wheat. 171, 174; *Minor* v. *Mechanics' Bank*, 1 Pet. 46, 67; *De*

Luca v. *Hughes*, 96 Fed. Rep. 923, 925; *Rose* v. *Perry*, 8 Yerg. 156; *Citizens' St. R. R.* v. *Burke*, 98 Tennessee, 650; 1 Chitty on Pleading, *270. Although the same precision of statement is not required as in pleadings at law, nevertheless it is held to be absolutely necessary that in bills of equity such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the plaintiff's case; and if the proofs go to matters not set up therein, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. *Harrison* v. *Nixon*, 9 Pet. 483, 503; Daniell's Ch. Pl. & Pr. *368.

The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son. The plaintiff expressly declined in both courts below so to amend his declaration as to allege pecuniary loss to the parents; and judgment properly went against him.

The request is now made that in view of all the circumstances—especially the former undetermined meaning of the statute, this court remand the cause for a new trial upon the declaration being so amended as to include the essential allegation. But we do not think such action would be proper. The courts below committed no error of which just complaint can be made here; and the rights of the defendant must be given effect, notwithstanding the unusual difficulties and uncertainties with which counsel for the plaintiff found himself confronted.

Judgment affirmed.